# INDEX.

## Subject Index.


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Statutory provisions sustaining jurisdiction | 1 |
| State statute the validity of which is involved | 2 |
| Date of decree and date of application for appeal | 6 |
| Nature of the case and ruling below | 7 |
| Cases believed to sustain the jurisdiction | 13 |
| Appendix "A"—Opinion of the Supreme Court of Mississippi of June 7, 1943 | 16 |
| Appendix "B"—Opinion of the Supreme Court of Mississippi of January 12, 1942 | 17 |
| Appendix "C"—Per curiam opinion of the Supreme Court of Mississippi | 21 |


## Table of Cases Cited.


| | |
|---|---|
| *American Sugar Refining Co.* v. *State of Louisiana*, 21 Sup. Ct. 43, 179 U. S. 89, 45 L. Ed. 102 | 13 |
| *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441 | 14 |
| *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462 | 14 |
| *Dower* v. *Richards*, 151 U. S. 658, 38 L. Ed. 305, 14 Sup. Ct. 452 | 14 |
| *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112 | 13 |
| *Fiske* v. *Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 Sup. Ct. 655 | 13 |
| *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499 | 13 |
| *Kansas City Southern Ry. Co.* v. *H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316 | 13 |
| *Londoner* v. *Denver*, 210 U. S. 373 | 13 |
| *Mackay* v. *Dillon*, 4 How. 431, 11 L. Ed. 1038 | 14 |
| *Mahler* v. *Eby*, 264 U. S. 32 | 13 |
| *Merchants' Nat. Bank* v. *Richmond*, 256 U. S. 635, 41 Sup. Ct. 619, 65 L. Ed. 1135 | 13 |
| *Norfolk, etc., R. Co.* v. *Conley*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745 | 13 |

Page

*Northern Pac. Ry. Co.* v. *Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836, 45 Sup. Ct. 412 ..... 13
*Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292 ..... 14
*Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 Sup. Ct. 527 ..... 14
*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176 .. 14
*Southern Ry. Co.* v. *Virginia*, 290 U. S. 190 ..... 13
*Southern P. Co.* v. *Schuyler*, 227 U. S. 601, 57 L. Ed. 662, 33 Sup. Ct. 277 ..... 13
*Truax* v. *Corrigan*, 237 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375 ..... 14
*Wichita R. & Light Co.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48 ..... 13
*Yick Wo* v. *Hopkins*, 118 U. S. 356 ..... 15

STATUTES CITED.

Constitution of the United States, 14th Amendment ... 9,10
Judicial Code, Section 237, as amended by the Acts of February 13, 1925, C. 229, Sec. 1, 43 Stat. 936 (28 U. S. C. 345); January 31, 1928, C. 14, 45 Stat. 54; and April 26, 1928, C. 440, 45 Stat. 466 ..... 1,2
Laws of Mississippi of 1938:
Chapter 113, Section 6 ..... 2,10
Chapter 113, Section 8 ..... 2,10
Chapter 150, Section 1 ..... 2,5

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1943

## No. 457

EDDIE J. VIATOR, ET AL.,

*Appellants,*

*vs.*

R. C. EDWINS, SHERIFF, ET AL.,

*Appellees.*

## JURISDICTIONAL STATEMENT.

*May it Please the Court:*

The appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

A.

**Statutory Provisions Sustaining Jurisdiction.**

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938 (U. S. Code, Title 28, Section 345), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in

question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, 45 Stat. 54, abolishing writ of error, and providing that all relief which theretofore could be obtained by writ of error, shall hereafter be obtainable by appeal, as amended by Act of April 26, 1928, Chapter 440, 45 Stat. 466.

The statutes of the State of Mississippi, the validity of which is involved, are Sections 6 and 8, Chapter 113, Laws of 1938, known as the Sales Tax Law of Mississippi, and Section 1, Chapter 150, Laws of 1938, which statutes, and the particular Sections thereof mentioned here, are to be found at pages 94, 95, 96 and 97, of the General Laws of Mississippi of 1938, where Sections 6 and 8 are set out, and at pages 348 and 349 of the General Laws of Mississippi of 1938, where Section 1, amending Section 2 of Chapter 119, Laws of 1932, is fully set out, the particular provisions of Sections 6 and 8, Chapter 113, of the Laws of 1938, and Section 1, Chapter 150, of the Laws of 1938, the validity of which is involved being in the following language:

"Sec. 6. Be it enacted, that section 8 of chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, be and the same is hereby amended so as to read as follows:

Taxpayer must keep records—failure to make returns —duty and power of commissioner.

"It shall be the duty of every person engaging or continuing, in this state, in any business for which a privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

"The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep such records shall subject the person so failing to all the penalties of this act.

"If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty-five per cent for the first offense and

fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section."

Sec. 8 provides: Be it enacted, that section 10 of chapter 119, laws of 1934, be and the same is hereby amended so as to read as follows:

Sec. 10. If any person having made a return and paid taxes thereon feels aggrieved by the additional assessment made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within ten days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider such petition, and shall grant such hearing, notifying the petitioner of the time and place fixed for such hearing. After such hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to cover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain

such suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

"Either party to such suit shall have the right to appeal to the supreme court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

"No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of section 420, code of 1930, shall not apply to taxes imposed by this act. * * *"

Section 1, Chapter 150, Laws of 1938, reads as follows:

"Sec. 1. Be it enacted by the Legislature of the State of Mississippi, that section 2 of Chapter 119, laws of 1932, be amended to read as follows:

"The governor shall designate the other associate commissioner as 'excise commissioner', who shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

"It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved in the appeal.

The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol * * *."

B.

**Date of Decree and Date of Application for Appeal.**

The date of decree sought to be reviewed, June 7, 1943. Suggestion of Error was filed by appellants, and said Suggestion of Error was overruled by the Supreme Court of Mississippi on July 9, 1943. Application of appellants for some member of the Supreme Court of Mississippi to certify that, in his opinion, the decision in the case appealed from is contrary to other decisions of the Court, with authorities, was denied on September 20, 1943. Petition of appellants for allowance of appeal to the Supreme Court of the United States, accompanied by Assignment of Error and Prayer for Reversal, was presented to the Chief Justice of the Supreme Court of Mississippi, in his office in the City

of Jackson, Mississippi, on Tuesday, September 28, 1943, and the appeal was allowed.

C.

**Nature of Case and Ruling Below.**

This is a proceeding by Bill of Complaint to enjoin appellees from collecting additional Sales Tax from appellants for the years 1937 and 1938, and for a perpetual injunction restraining appellees from executing a judgment of the Circuit Court of Hinds County, Mississippi, 1st District, and the Supreme Court of the State of Mississippi, affirming an additional assessment by appellees, State Tax Commission of Mississippi, A. H. Stone and J. E. Davis, Excise Commissioner, under the supposed authority of Section 6, Chapter 113, Laws of 1938. The Bill of Complaint filed herein alleges, and the demurrer admits that said assessments were made without foundation in fact, and contrary to law; that they were made without evidence, over the objection of appellants, without advising appellants of the nature of case they were called upon to meet, without subpoenaes for witnesses in their behalf, without a Bill of Particulars of the demand of appellees, and after failing to answer the interrogatories propounded to appellees. The Bill of Complaint alleges, and the demurrer admits, that appellees proceeded against appellant contrary to the accepted method of judicial procedure; they failed and refused to grant appellants a hearing, that no adequate hearing was had, that nothing was introduced in evidence to sustain said additional sales tax assessments, and at the conclusion of the pretended hearings held before the State Tax Commission and the Excise Commissioner no report in writing was made, setting forth a review of the cause, and the essential facts of the matter. Appellants raised the question of jurisdiction of appellees to make the two ad-

ditional sales tax assessments without first showing taxpayer had failed to maintain adequate records, and preserve invoices for a period of two years. The Bill of Complaint alleges, and the demurrer admits, that taxpayer moved to quash the assessments else that they should be abated until the statutory duties enjoined on appellees were fully discharged. The Bill of Complaint alleges, and the demurrer admits that appellees refused to investigate the matter fully, and said they would not investigate it fully or at all. No record was made of the testimony of appellant, taxpayer, and the witnesses introduced by him, which the Bill of Complaint shows, and the demurrer admits, said additional assessments were not made from the best information available, as required by the Act, but by comparison, appellees comparing the business of appellant, for the years 1937 and 1938, for which the additional assessments are made, with the business of other merchants in the year 1939, and which testimony further showed that appellees made said additional assessments against appellant, taxpayer, purposely high, to take care of whatever they might be able to find. The Bill of Complaint charges, and the demurrer admits, that such testimony was not contradicted, and not denied; in fact, was not even disputed; no evidence was introduced by appellees, no books, records or other papers and no depositions were taken, and nothing whatever was introduced in evidence. The Bill of Complaint shows, and the demurrer admits, that at the conclusion of the hearing before the Excise Commissioner, pursuant to the provisions of Section 1, Chapter 150, Laws of 1938, said Excise Commissioner failed and refused to submit written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing, setting forth a review of the cause and the essential facts of the matter. There was nothing done that remotely resembles a hearing, and the duty enjoined

on appellees by the statutes to investigate the matter fully, to subpoena witnesses, examine books, records and other data, and at the conclusion of the hearing to submit all written evidence, documents, records, and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause, and the essential facts of the matter, was ignored and violated, and not performed. The Bill of Complaint charges, and the demurrer admits, that appellant, taxpayer, paid all sales tax due the State of Mississippi for the years 1937 and 1938 and that he does not owe additional sales tax for said years, or any years. It is contended by appellants here, that the statutes referred to, as construed and applied by appellees and the Supreme Court of the State of Mississippi, in this cause, deprive appellants of due process of law, and equal protection of the law, and violate the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the State of Mississippi held that the decision of the former case, on certiorari, was the law of this case. As the opinion in the former case shows, the court held it could not consider the lack of evidence to sustain the additional assessments on certiorari, and that whether there was evidence before the State Tax Commission of Mississippi to sustain said additional assessments was not before the Circuit Court of Hinds County, and not before the Supreme Court, because, on certiorari, the court would only consider questions of error or law arising or appearing on the face of the record. Appellants show by their Bill of Complaint, which is admitted by demurrer, that they have not had judicial, as contradistinguished from an administrative, hearing, and they have been deprived of a hearing of their cause on its merits; that the Supreme Court of the State of Mississippi holds that they are powerless to complain of such action, and no court in the State of Mississippi, can investigate the facts charged

in the Bill of Complaint, which are admitted by demurrer. It is contended by appellants here, that the statutes referred to, as construed and applied by appellees, and the Supreme Court of the State of Mississippi, in this cause, deprive appellants of due process of law, and the equal protection of the law, and violate the Fourteenth Amendment to the Constitution of the United States.

The matters involved are substantial in that the statutes, as construed and applied by appellees, in which they were upheld by the Supreme Court of Mississippi, deprive appellant of that due process which the legislature intended, and which it was the intention of the Fourteenth Amendment to guard against impairment by state action. Said statutes were so construed and applied, that appellees were permitted to proceed against appellant without subpoenas for witnesses, without the documents, evidence and depositions provided by the statutes, without being required to inform appellant of the state of case he was required to meet and defend, without a record of the proceedings, and without a finding of fact, setting forth a review of the cause and the essential facts of the matter, contrary to the express provisions of Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, and thus said statutes, as construed and applied, deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The questions involved are, therefore, substantial. Without compliance with the statutes, as enacted by the legislature, appellees in this cause were permitted to make the additional assessments against appellant. Appellant was deprived of the opportunity to know the state of the case against him, given no opportunity to defend himself, and the action of appellees was, hence, arbitrary and capricious. To permit appellees to collect the amount of the said addi-

tional assessments, will take the property of appellant without due process of law.

From the time of filing his petition, following receipt of the registered notice of the additional assessments for sales tax, appellant attacked the constitutionality of Section 6, Chapter 113, Laws of 1938, Section 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, of Mississippi, as construed and applied by appellees, in proceeding against him arbitrarily and without due process. The questions involved in this cause are substantial. The Federal question being whether the action of appellees deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The statutes themselves, if properly construed and applied, may be constitutional, except as to the delegation of legislative power, later to be covered in this Amended Statement of Jurisdiction, providing for Notice by Registered mail, hearings, introduction of evidence, documents and records and other data, summoning witnesses, making a report in writing setting forth a review of the cause and the essential facts of the matter. Here the procedure was not as provided by the statutes. Appellees so construed the statutes that they were not required to afford appellant an adequate hearing, refused him subpoenas, a record of the cause, refused to investigate the matter fully, or at all, a report in writing setting forth a review of the cause and the essential facts of the matter. They construed the statutes as not requiring them to introduce evidence. Appellant contends he was not afforded a hearing within the meaning of the statutes, that no fair and adequate hearing was held by appellees, and the assessments are void on their face for want of evidence, to support them, and a finding of fact by appellees upon which the court can pass judgment, or know what was before the State Tax Commission of Mississippi, and upon what the

additional assessments against appellant were, and are, founded, beyond the naked charge that appellant owes additional sales tax to the State Tax Commission of Mississippi.

The Federal question presented by the record of this cause was raised by sworn Bill of Complaint, filed herein, R. 4[1], and admitted by demurrer, R. 100.

The Federal question involved in this cause was further presented by Assignment of Errors and Suggestion of Error, R. 115, filed in the Supreme Court of the State of Mississippi.

Appellants append to this Statement of Jurisdiction, Copy of the Opinion of the Supreme Court of Mississippi, reported in 5 So. (2d) 487-489 and in 14 So. (2d) 212-213, as well as copy of Per Curiam request of the Supreme Court of the State of Mississippi for additional briefs on the Federal question involved in this cause.

The Supreme Court of the State of Mississippi affirmed the decree of the Chancery Court of Harrison County, Mississippi, sustaining the demurrer to the Bill of Complaint filed herein and dismissing said Bill at the costs of appellants.

As shown by the record of this cause, by sworn Bill of Complaint, and admitted by demurrer, the two additional sales tax assessments against appellant, taxpayer, have no foundation in fact; they were made without evidence, by conjecture, capriciously, and arbitrarily. As shown by Bill of Complaint, admitted by demurrer, appellant, taxpayer, met the burden imposed on him, demanded a hearing, which is provided by statute, and thereupon appellees failed and refused to grant said hearing and investigate the matter

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[1] All references to the record are to the pages of the certified transcript of the unprinted record prepared by the Clerk of the Supreme Court of Mississippi, and on file with the Clerk of this Court. The record has not yet been printed.

fully before proceeding further. The Supreme Court of the State of Mississippi has sanctioned such procedure, and the statutes involved in this cause, as thus construed and applied against appellants, deprive them of due process of law and the equal protection of the law and violate the Fourteenth Amendment to the Constitution of the United States.

Cases sustaining the jurisdiction of the Supreme Court of the United States to review this cause relied upon by appellants, are the following, in brief:

*American Sugar Refining Co.* v. *State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102.

*Southern P. Co.* v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 S. Ct. 277.

*Norfolk, etc. R. Co.* v. *Conley*, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745.

*Kansas City Southern R. Co.* v. *H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 S. Ct. 316.

*Merchants' Nat. Bank* v. *Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. Ed. 1135.

*Fiske* v. *State of Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655.

*Northern Pac. Ry. Co.* v. *Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412.

*Southern Ry. Co.* v. *Virginia*, 290 U. S. 190.

*Londoner* v. *Denver*, 210 U. S. 373.

*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 171.

*Wichita R. & Light Co.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48.

*Mahler* v. *Eby*, 264 U. S. 32.

*Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508.

*Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441.
*Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292.
*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176.
*Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462.
*Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.
*Truax* v. *Corrigan*, 237 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375.
*Mackay* v. *Dillon*, 4 How. 431, 11 L. Ed. 1038.
*Dower* v. *Richards*, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 S. Ct. 452.

It is further the contention of appellant that Section 6, Chapter 113 of the Laws of Mississippi of 1938, is unconstitutional, null and void and violative of the due process clause of the Federal and State Constitutions and the equal protection clause of the Constitution of the United States, in that it permits the Chairman of the State Tax Commission to proceed without benefit of compulsory process for the production of witnesses, books, records and other matter necessary to the proper determination of additional sales tax, and said Act is unconstitutional and violates the Fourteenth Amendment of the Constitution of the United States as to the rights of appellant in that it permits the additional sales tax assessment attempted to be enforced against appellant without the benefit of written evidence, without requiring his interrogatories to be answered and a bill of particulars to be furnished; and, further Section 6, Chapter 113, Laws of 1938, permitting appellees to make additional returns and assessments from the "best information available" without defining and limiting the power and right of the appellees, vests legislative

discretion with appellees, and is an attempt to delegate legislative prerogatives to appellees, and said section, and particularly said provision, is unconstitutional, null and void.

Appellant submits that the questions presented, showing jurisdiction of this Court to review the judgment of the Supreme Court of Mississippi on appeal are substantial, and present a Federal question.

This Honorable Court has jurisdiction to decide and is free to pass upon all controverted issues, whether or not they involve Federal questions, and the permissibility of delegation of power may thus be deliberated and, in the absence of controlling State decisions, will be determined as an original proposition. The case relied upon by appellants to sustain the jurisdiction of this Court upon this last proposition is:

*Yick Wo* v. *Hopkins*, 118 U. S. 356.

It is respectfully submitted that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
*Counsel for Appellants.*

## APPENDIX "A".

### IN THE SUPREME COURT OF MISSISSIPPI.

No. 35,405

(Opinion Rendered June 7, 1943.)

EDDIE J. VIATOR, et al.,

*vs.*

R. C. EDWINS, Sheriff, et al.

Division B.

ALEXANDER, *J.:*

Appellant filed his bill for injunction against appellee, who, as sheriff, was proceeding to enforce by execution the judgment affirmed by this Court in Viator *v.* State Tax Commission, 5 So. (2d) 487. The chancellor set a day for a hearing upon application for temporary injunction. The appellee, however, attacked the bill by demurrer which set up that the bill itself which in meticulous detail disclosed all the steps and proceedings precedent to the final judgment in the above case, and further interposed the defense that such case conclusively settled the law of the present proceeding. The chancellor sustained the demurrer and dismissed the bill. It is hardly necessary to add that the demurrer did not admit the allegations of the bill as to the irregularity of the former proceeding and as to the invalidity of the judgment, which are mere conclusions of law.

Appellant's contentions are pressed with painstaking industry and earnestness, and we have examined the entire record carefully. It would not be helpful to rehearse the history of this litigation. Appellant discloses in his bill that he has availed of and exhausted every administrative and legal remedy, and we find it necessary only to quote from the opinion in the former case, which, after discussing the powers of the Chairman of the State Tax Commission and the requirements which must be met to make such

powers effective, stated: 'The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based.'

The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment.

Nor does Code 1930, Section 420, justify this injunctive proceeding. Regardless of conditions precedent to the exercise of this right under this section (as to which see Stone *v.* Kerr, 10 So. (2d) 845), the taxes against the collection of which the injunction was sought are, in view of our former decision, not 'attempted to be collected without authority of law.'

AFFIRMED.

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## APPENDIX "B".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,664.

(Opinion Rendered January 12, 1942.)

EDDIE J. VIATOR

*vs.*

STATE TAX COMMISSION, et al.

14840. In Banc

SMITH, *C. J.:*

This is an appeal from a judgment affirming an order of the State Tax Commission approving two additional sales tax assessments against the appellant. The assessments were made by the Chairman of the State Tax Commission

under the provisions of Sections 5 and 6, Chap. 113, Laws of 1938, and were approved by the State Tax Commission on an appeal to it.

Section 8 of that statute provides that "No injunction shall be awarded by any Court or Judge to restrain the collection of the taxes imposed by this act or to restrain the enforcement of this act." The appellant says that this provision of the statute violates Section 159 of the State's Constitution which prescribes the jurisdiction of the chancery court. This may or may not be true, but we are not called on to determine it for the reason that if this section of the statute does run counter to the Constitution, that fact would have no effect on the remainder of it, which would remain in full force and effect.

Another of the appellant's complaints is that "there is no presumption in favor of the validity of an order unless there is evidence to support such order." The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is "confined to the examination of questions of law arising or appearing on the face of the record and proceedings." Federal Credit Co. *v.* Zepernick Gro. Co., 153 Miss. 489, 120 So. 173; Hamilton *v.* Long, 181 Miss. 627, 180 So. 615.

Three of the appellant's remaining complaints necessary to be considered are:

1. State Tax Commission has only such jurisdiction as conferred by Statute. In the case of additional assessments for sales tax, such can be made only for failure to keep adequate records and preserve invoices for a period of two years. Unless jurisdictional facts appear of record, the State Tax Commission has no jurisdiction to make an additional assessment for sales tax.

2. The claim that taxpayer kept records and preserved invoices for a period of two years, is a denial of an essential jurisdictional fact, and before the State Tax Com-

mission could proceed under the law, jurisdiction to make the additional assessment must be proven by appellees, and must affirmatively appear of record.

3. Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi.

These three complaints will be considered together.

Under Sections 4, 5, and 6, Chap. 113, Laws of 1938, it is the duty of a person liable to the tax imposed on sales of property to make a return to the chairman of the State Tax Commission, on prescribed forms, of all cash and credit sales made by him. When this is done, the chairman of the Commission, designated in the statute, and will hereinafter so be, as the Commissioner, is charged with the duty of examining into its correctness. In so doing, he may examine the books and other records of the taxpayer, if any (Sec. 6), and (Sec. 12) "any books, papers, record, or other data bearing upon the correctness of any return * * * including the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise, doing business in this state, * * * and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons." If (Sec. 6) adequate records of his sales are not kept by the taxpayer, the Commissioner may determine the correctness of the taxpayer's return thereof "from the best information available." If the Commissioner finds that the taxpayer's return of the amount of his sales is less than it should be, it becomes his duty to make an additional return or assessment of the amount of the taxpayer's sales. When this is done, he must give the taxpayer written notice thereof by registered mail, and, if the taxpayer makes no objection thereto, the return or assessment becomes final. If, however, the taxpayer so requests, he shall be given a hearing on the assessment by the Commissioner, and, if dissatisfied with the result thereof, he may appeal (Sec. 8) therefrom to the State Tax Commission which, after a full hearing and consideration of the

evidence introduced by the taxpayer, must either approve, disapprove, or modify the assessment. This procedure was here followed.

Two additional returns or assessments were here made by the Commissioner on blank forms prescribed for that purpose, the statute not requiring such to be entered on an assessment roll. One of these returns, after setting forth the taxpayer's name and address, recites: "An examination of your records made in accordance with Sections 7, 8, and 18 of the Sales Tax Law of 1932 as re-enacted and amended, for the period from January 1, to December 31, 1938 indicates an additional tax due thereon in the amount of $1,606.64, arrived at as follows." It then sets forth the amount of sales theretofore reported by the taxpayer and the amount thereof found by the Commissioner, in addition to that returned by the taxpayer, with this notation, "prima facie assessment, same having been made from the best information available." It then sets forth the amount of taxes due on the sales by the taxpayer. The notice by registered mail to the appellant of this additional return is, in part, as follows: "You are hereby given notice, by registered mail, of the hereinafter assessments made against you from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937, to December 31, 1937 and January 1, 1938 to December 31, 1938, by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years." The other assessment was for the year 1939, and it and the notice were similar to the above. The order of the Tax Commission simply approved the assessments and stated the amount of the tax due thereon.

The right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him, is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records in Section 6 of the statute is to permit the Commissioner,

when the taxpayer's records are inadequate, to determine the correctness of the return made by him "from the best information available."

The Chairman of the State Tax Commission possesses only such powers as are conferred on him by statute expressly or by implication, and he can make an additional sales tax assessment in only such cases as the statute permits. He possesses in this respect a special and limited and not a general jurisdiction. A tribunal or officer exercising a special and limited jurisdiction can act only when the facts exist which invest him with authority to act, and these facts, in their ultimate and essential aspects, here the additional assessment and the grounds for making it, must be disclosed by the order made thereon. The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made.

AFFIRMED.

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## APPENDIX "C".

### IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,664.

EDDIE J. VIATOR

*vs.*

STATE TAX COMMISSION, et al.

In Banc

Per CURIAM:

One of the appellant's contentions is that "Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitu-

tional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi."

The Court desires briefs addressed and confined to the question thus raised. The briefs should discuss the following questions:

1. Is that State Tax Commission a quasi-judicial commission or a mere administrative agency?

2. What "finding of basic facts" should, but does not, appear in the order of the State Tax Commission here in question?

3. What provision of the Constitution, or of a statute, or rule of the common law requires such a finding to appear in the order of the commission?

4. Does the fact that the order here in question is one assessing property differentiate it, in so far as the question here under consideration is concerned, from other orders of an administrative agency?

5. May the recitals in the last notice, the notice being framed by the Commissioner himself, be considered as a part of the order, and as sufficient to supply recitals which, according to appellant's apparent contention, ought to have been a part of the order itself?

No other questions should be discussed in these briefs.

The brief of counsel for the appellant to be filed on or before October 10, 1941; the reply thereto by counsel for the appellee to be filed within one week after the filing of the brief for counsel for the appellant; the rejoinder of counsel for the appellant to be filed within five days after the filing of the brief of counsel for the appellee. These dates may be changed by written agreement of counsel filed with the clerk of this Court; copies to be served in accordance with the rules of this Court.

FILED
OCT 26 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 457

EDDIE J. VIATOR, ET AL.,
*Appellants,*

vs.

R. C. EDWINS, SHERIFF, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

# BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

ALBERT SIDNEY JOHNSON, JR.,
*Counsel for Appellants.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Application of Rule 7, Paragraph 1, of the Supreme Court of the United States | 1 |
| Matter involved in this appeal case | 2 |
| Appellants launched their attack on the Constitutionality of the State statutes, as construed and applied against them, in the State courts, by Bill of Complaint, Assignment of Errors, Suggestion of Error, Application for Certificate, filed in the State Courts, and Assignment of Errors, filed in this Court | 4,6 |
| The Facts of the Case | 6 |
| The Supreme Court of the United States has jurisdiction of this Appeal case pursuant to Section 237(a) of the Judicial Code, as amended | 6 |
| Argument and authorities | 8 |
| The Motion of Appellees to Dismiss or Affirm should be overruled and Jurisdiction Noted | 27 |
| Notice of Order granting extension of time to appellants to apply for Certiorari | 27 |
| Conclusion | 27 |


## Cases Cited.


| | |
|---|---|
| *Adams* v. *Russell*, 229 U. S. 353, 33 Sup. Ct. 846, 57 L. Ed. 1224 | 11 |
| *Adams, State Rev. Agent* v. *First Nat. Bank of Greenwood*, 60 S. (Miss.) 772 | 16 |
| *American Fire Ins. Co.* v. *King Lumber, etc., Co.*, 250 U. S. 2, 39 Sup. Ct. 431, 63 L. Ed. 810 | 11 |
| *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, 479, 480, 57 Sup. Ct. 521, 528, 81 L. Ed. 751 | 9 |
| *American Sugar Refining Co.* v. *State of Louisiana*, 21 Sup. Ct. 43, 179 U. S. 89, 45 L. Ed. 102 | 11 |
| *Baltimore, etc. R. Co.* v. *Maryland*, 20 Wall. 643, 22 L. Ed. 446 | 12 |
| *Bolivar Co.* v. *Coleman, et al.*, 15 So. (Miss.) 108, 109 | 16 |

Page

*Boutwell* v. *Board of Supervisors*, 128 Miss. 337, 91, So. 12 ..... 17
*Broadwell* v. *Carter County*, 253 U. S. 25, 40 Sup. Ct. 422, 64, L. Ed. 759 ..... 12
*Broom* v. *Board of Supervisors of Jefferson Davis County*, 171 Miss. 586 ..... 16
*Canara, L. H., Furn. Co.* v. *Mississippi State Tax Commission*, 160 Miss. 185 ..... 15
*Carlson* v. *Washington*, 234 U. S. 103, 106, 58 L. Ed. 1237, 1238, 34 Sup. Ct. 717 ..... 13
*Chicago Junction case, The*, 264 U. S. 258 ..... 9
*Clark* v. *Williard*, 292 U. S. 112, 118, 54 Sup. Ct. 615, 617, 78 L. Ed. 1160 ..... 9
*Craft* v. *DeSoto Co.*, 79 Miss. 546, 31 So. 204 ..... 17
*Cromwell* v. *Count of Sac.*, 94 U. S. 351, 352 ..... 10
*Dahnke Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 ..... 4
*Dower* v. *Richards*, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 Sup. Ct. 452 ..... 13
*Dulion* v. *Folkes*, 153 Miss. 91 ..... 16
*Durousseau* v. *United States*, 6 Cranch. 307, 3 L. Ed. 232. 10,22
*First Nat. Bank of Hartford* v. *City of Hartford*, 47 Sup. Ct. 462, 273 U. S. 548, 71 L. Ed. 767 ..... 14
*Fiske* v. *State of Kansas*, 47 Sup. Ct. 655, 274 U. S. 380, 71 L. Ed. 1108 ..... 14
*Florida E. C. R. Co.* v. *United States*, 234 U. S. 167 .... 10
*Fox River Paper Co., et al.*, v. *Railroad Commission of Wisconsin*, 47 Sup. Ct. 669, 71 L. Ed. ..... 12
*Galpin* v. *Page*, 85 U. S. (19 Wall.) 21 L. Ed. 959 ..... 14,19
*Garner* v. *Webster County*, 31 So. (Miss.) 211 ..... 16
*Great Lakes Dredge & Dock Co.* v. *Huffman*, 63 Sup. Ct. 1071 ..... 9,22
*Great Lakes Dredge & Dock Co.* v. *Huffman*, 63 Sup. Ct. 1073 ..... 19
*Green* v. *Creighton*, 10 Sm. & M. (18 Miss.) 159, 48 Am. Dec. 742 ..... 16
*Gulf M. & O. R. Co.* v. *Webster County*, 13 So. (2d) 644, 645 ..... 19
*Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135, 46 Sup. Ct. 52, 53, 70 L. Ed. 195 ..... 9

Page

*Gully* v. *Jackson International Co.*, 165 Miss. 103..... 15
*Henderson Molpus Co.* v. *Gammill*, 115 So. (Miss.) 719, 720..... 17
*Henry, et al.* v. *Board of Supervisors of Sunflower County*, 71 So. (Miss.) 742, 743..... 17
*Hinton* v. *Perry County*, 79 Miss. 618..... 16
*Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 36 Sup. Ct. 168, 60 L. Ed. 439..... 12, 13
*I. C. C.* v. *Louisville & N. R. R. Co.*, 227 U. S. 88..... 10
*Jackson Equipment & Service Co.* v. *Dunlop*, 172 Miss. 742..... 16
*Kerr* v. *Stone*, 10 So. (2d) 845..... 21
*King, et al.* v. *Board of Supervisors*, 133 Miss. 501, 97 So. 811..... 17
*Klinger* v. *Missouri*, 13 Wall. 257, 20 L. Ed. 635..... 12
*Lee, et al.* v. *Bassett, et al.*, 121 So. (Miss.) 843..... 17
*Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412..... 10
*Lester* v. *Miller, Sheriff, et al.*, 24 So. (Miss.) 194..... 16
*Mackay* v. *Dillon*, 4 How. 431, 11 L. Ed. 1038..... 13
*Maguire* v. *Tyler*, 8 Wall. 650, 19 L. Ed. 320..... 12
*Matthews* v. *Rodgers*, 284 U. S. 521, 52 Sup. Ct. 217, 76 L. Ed. 447..... 19, 23
*McKenzie* v. *Adams Banks Lumber Co.*, 157 Miss. 482.. 15
*Memphis Natural Gas Co.* v. *Beeler*, 62 Sup. Ct. 859... 6
*Metropolitan Water Co.* v. *Kaw Valley Drainage Dist.*, 223 U. S. 519, 523, 32 Sup. Ct. 246, 247, 56 L. Ed. 533. 9
*Miller* v. *Illinois Cent. R. Co.*, 146 Miss. 422..... 15
*Moore* v. *Tunica County*, 143 Miss. 839, 108 So. 900... 19
*Neilson* v. *Lagow*, 12 How. 98, 13 L. Ed. 909..... 12
*Ng Fung Ho* v. *White*, 259 U. S. 276..... 19
*Norfolk, etc., R. Co.* v. *Conley*, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745..... 13
*Norfolk & W. R. Co.* v. *West Virginia*, 236 U. S. 605, 610, 59 L. Ed. 745, 35 Sup. Ct. 437..... 13
*North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 259, 58 L. Ed. 745, 35 Sup. Ct. 437..... 13
*Pan American Petroleum Corp.* v. *Miller*, 154 Miss. 565. 15
*Peoria & P. U. R. Co.* v. *United States*, 263 U. S. 528.. 9
*Rhodes* v. *New Orleans Great Northern R. Co.*, 91 So. (Miss.) 282..... 16

Page

*Root* v. *McFerring*, 37 Miss. 17, 17 Am. Dec. 49..... 16
*Southern P. Co.* v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 Sup. Ct. 277..... 12
*Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48. 10
*Southern R. Co.* v. *Clift*, 260 U. S. 316, 43 Sup. Ct. 126, 67 L. Ed. 283..... 14
*Southern Railway Co.* v. *Virginia*, 290 U. S. 190..... 14
*Stamps* v. *Newton*, 3 How. (4 Miss.) 34..... 16
*State* v. *Union Tank Car Co.*, 151 Miss. 797..... 15
*St. Louis, etc., R. Co.* v. *McWhirter*, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. 1179..... 12
*Tait* v. *Western Md. Railway Co.*, 289 U. S. 620..... 22
*Topper Bros.* v. *Buttross*, 178 Miss. 659..... 16
*Town of Utica* v. *State ex rel. Rice*, 166 Miss. 565..... 15
*Truax* v. *Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254..... 13
*Union Tank Line Co.* v. *Wright*, 249 U. S. 275..... 9
*United States* v. *Moser*, 266 U. S. 236, 241..... 10
*Viator* v. *State Tax Commission, et al.*, 193 Miss. 266, 5 So. (2d) 487, 62 Sup. Ct. 1109, 62 Sup. Ct. 1275; 316 U. S. 644, 316 U. S. 711..... 8,9,21
*Wallace* v. *State, ex rel Tucker*, 61 So. (Miss.) 163..... 16
*Ward* v. *Love County*, 253 U. S. 17, 40 Sup. Ct. 419, 64 L. Ed. 751..... 12
*Watters* v. *Michigan*, 248 U. S. 65, 39 Sup. Ct. 29, 63 L. Ed. 129..... 12
*Welch* v. *Bryant*, 157 Miss. 559..... 16
*Whall* v. *Saenger Theatres Corp.*, 200 So. (Miss.) 442... 16

STATUTES CITED.

Section 237(a) Judicial Code, as Amended..... 3,4,6,27
Section 8, Chapter 119, Laws of 1934..... 14,18
Section 10, Chapter 119, Laws of 1934..... 21,25
Section 6, Chapter 113, Laws of 1938..... 3,6,7,8,20,25
Section 8, Chapter 113, Laws of 1938..... 3,6,19,20
Section 1, Chapter 150, Laws of 1938..... 3,6
Appropriation Statutes..... 20,23
Chapter 78, Laws of 1938.....
Chapter 81, Laws of 1940.....
Chapter 11, Laws of 1942.....

Page

Section 3276, Mississippi Code of 1930..... 20,24,25
Constitution of the United States, 14th Amendment. 2,3,5,12
Constitution of Mississippi, Section 14..... 2,3,5

RULES CITED.

Rules of the Supreme Court of the United States:
Rule 7, Paragraph 1..... 1,2
Rule 7, Paragraph 3..... 2
Rule 12, Paragraph 3..... 1,2,18

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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## No. 457

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EDDIE J. VIATOR, ET AL.,

*Appellants,*

*vs.*

R. C. EDWINS, SHERIFF, ET AL.,

*Appellees.*

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

**BRIEF ON BEHALF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.**

---

MAY IT PLEASE THE COURT:

Counsel for appellees has filed a statement against the jurisdiction of this Court and motion to dismiss or affirm, pursuant to Rule 12, paragraph 3 of this Court, but he has failed to comply with and conform to Rule 7, paragraph 1 of the Revised Rules of the Supreme Court of the United States. His motion to dismiss or affirm does not clearly state its object and the facts on which it is based. While Rule 12, paragraph 3 permits appellees to file a type-

written statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant, and include in, or file with, such opposing statement, a motion to dismiss or affirm, it is respectfully submitted that Rule 7, paragraph 1 requires every motion to the court to state clearly its object and the facts on which it is based, and for that reason it is contended that said motion of appellees to dismiss or affirm should be overruled.

Taking advantage of the opportunity afforded by appellees to file a brief in this Court (Rule 7, paragraph 3), counsel for appellants submits the following brief and argument on behalf of appellants sustaining the jurisdiction of this court of this case on appeal from the Supreme Court of Mississippi.

The counter jurisdictional statement of appellees does not meet the requirements of Rule 12, Section 3 of the Supreme Court of the United States. The statement of facts made by appellants in their jurisdictional statement is not denied. Appellees do not show they afforded taxpayer due process of law. They do not quote any part of the record to sustain them. They admit the jurisdictional requirements contended by appellants. They do not show such requirements of the statutes were complied with. They cannot superimpose in this appeal case more than the record shows. Their demurrer is their only pleading. Said demurrer merely challenged the Bill on its face, said there was no equity on the face of the Bill. Appellants say they were denied due process, that the State statutes as construed and applied against them, violate the 14th Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi. That, we submit, is more than enough equity to sustain the Bill of Complaint and require an answer. It is sufficient to

require this Court to take jurisdiction of this appeal case under Sec. 237 (a), Judicial Code.

> "Sec. 237(a). A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The question for decision is whether Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, General Session Laws of Mississippi, under the purported authority of which additional sales tax assessments were made for the years 1937 and 1938 against Eddie J. Viator, taxpayer, as construed and applied by the State Tax Commission of Mississippi, A. H. Stone, Chairman; J. E. Davis, Excise Commissioner, and the Supreme Court of Mississippi, violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi, and deny taxpayer due process of law and the equal protection of the law.

The case comes here by appeal from a decree of the Supreme Court of Mississippi, which sustained the tax and affirmed decree of the Chancery Court of Harrison County, Mississippi, sustaining demurrer to Bill of Complaint filed

to enjoin the execution of judgment of the Circuit Court of Hinds County, Mississippi, affirming said assessments.

Appellants contend that the case is properly an appeal, under Section 237(a) of the Judicial Code as amended, 28 U. S. C., Section 344(a), 28 U. S. C. A., Section 344(a), because the validity of the Mississippi statutes as applied to the facts of this case, has been drawn in question.

*Dahnke Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239.

The following quoted allegations from appellant's Bill of Complaint, filed in the Chancery Court, show that appellants launched their attack upon the validity of the statutes themselves, as construed and applied, viz:

(a) "2. That the Sales Tax Statutes of Mississippi, as construed and applied against Complainant by the State Tax Commission of Mississippi, and A. H. Stone, Chairman thereof, and attempted to be enforced against Complainant, and as construed and applied against Complainant by the Circuit Court of Hinds County, and the Supreme Court of Mississippi, as hereinafter more fully shown, are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi, and deprive Complainant of, and deny to him, the equal protection of the law and due process of law" (R. 5).

(b) "4. This is a controversy arising over the constitution and laws of the United States, in that Complainant asserts, alleges and claims that said House Bills Nos. 70, 559, and 668, passed by the legislature of the State of Mississippi, and approved February 28th, 1934, March 26th, 1936, and April 4, 1938, respectively, in the various particulars hereinafter more particularly set out, as construed and applied by A. H. Stone, Chairman of the State Tax Commission of Mississippi, the State Tax Commission of Mississippi,

against Complainant, and as construed and applied by the Circuit Court of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, against Complainant, violate Section Fourteen of the Constitution of Mississippi and the Fourteenth Amendment to the Constitution of the United States, in that said statutes, as construed and applied, and attempted to be enforced against Complainant, deprive him of his property without due process of law, are an arbitrary exercise of power, and deny to Complainant the equal protection of the law" (R. 6-7).

(c) "24 (13) That Chapter 113, Laws of 1938, and Chapter 150, Laws of 1938, as construed and interpreted by respondents, and attempted to be enforced by them against Petitioner, deny to Petitioner the equal protection of the law, guaranteed by the 14th Amendment to the Constitution of the United States, and deny to petitioner due process of law guaranteed by said 14th Amendment to the Constitution of the United States, and said laws, Chapter 113, and Chapter 150, of the Laws of 1938, are unconstitutional, null and void, and violate the 14th Amendment to the Constitution of the United States" (R. 52-53).

(d) "26. * * * Complainant shows the Court that the statutes of the State of Mississippi, copied in extenso herein, as construed and applied against Complainant, deprive him of due process of law and the equal protection of the law, and they are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States and Section 14 of the Constitution of the State of Mississippi. * * *" (R. 57-58).

Appellants show this Court that they attacked the statutes of the State, as construed and applied against them, as violative of the Fourteenth Amendment to the Constitution of the United States and Sec. 14 of the Constitution of Mississippi, in Paragraphs 27, and 31, of their Bill of Complaint filed in the State court (R. 61-62 and R. 63, 64, 65).

The conditions prescribed by the Judicial Code, for an appeal from a State court decision to the Supreme Court of the United States were, and are, rigorously fulfilled. The objection raised in *Memphis Natural Gas Co.* v. *Beeler*, 62 S. Ct. 859, are thus met and overcome.

The validity of the State statutes, i. e., Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, were challenged by appellants' Bill of Complaint, R. 4-69, Assignment of Errors, R. 117, 119, 123, 5, 6, Suggestion of Error, omitted from certified transcript, and application for Certificate, omitted from certified transcript, all filed in the State courts, and is further challenged by the Assignment of Error filed in this Court (R. 131, 2, 3, 4, 5, 6, 7, 8, 9, 140, 141).

Appellants met the burden imposed on them to show affirmatively that this Court has jurisdiction under Section 237(a) of the Judicial Code, as amended.

The obligatory appellate jurisdiction of this Court is invoked, under Judicial Code, Section 237(a), as amended.

The facts of this case are admitted by demurrer (R. 100-102), they show that appellees, Commission, its Chairman, and the Excise Commissioner, acted without jurisdiction (R. 40, 42, 3, 4, 5, 6). No hearing sufficient to meet the demands of due process was granted. Appellees proceeded without evidence (R. 42, 3, 4). They refused to investigate the matter fully, as required by Section 6, Chapter 113, Laws of 1938; said they would not investigate it fully, or at all. No report in writing was made, setting forth a review of the cause and the essential facts of the matter. Appellees failed and refused to confront taxpayer with witnesses against him; they gave him no opportunity to know the state of case against him and to cross-examine witnesses. They refused him subpoenas for witnesses in his behalf. They failed to show taxpayer was delinquent in maintaining adequate records and preserving invoices for a period of two

years (R. 42, 3, 4, 5, 6). Without such showing, the Commissioner mentioned in Section 6, Chapter 113, Laws of 1938, had no jurisdiction to make additional sales tax assessments against appellant. Appellees failed and refused to give taxpayer notice of the additional returns and assessments by registered mail as required by said Section (6). They merely wrote him a letter and said he owed additional sales tax (R. 79). Copies of the returns and assessments were not attached and enclosed. No assessments were ever introduced in evidence. They are not in the record. Appellees did not make out a *prima facie* case. After the refusal of the Excise Commissioner to make a report in writing, setting forth a review of the cause and the essential facts of the matter, the appeal to the entire Commission, pursuant to Section 1, Chapter 150, Laws of 1938, was a mere formality. Not having heard the matter and without any evidence in the record, and with no report in writing by the Excise Commissioner, required by said Section (1), the appeal to the entire Commission was a farce. The Commission only had a letter from the Excise Commissioner concluding that said assessments should remain as originally assessed (R. 44-45). Objections made by taxpayer to the Excise Commissioner and the Commission were ignored and went for naught.

The Bill of Complaint alleges and the demurrer admits, that appellees, Commission, its Chairman and the Excise Commissioner, acted arbitrarily, capriciously, and without foundation in fact, there was no evidence to sustain the additional assessments (R. 42, 3, 4); they were not made from the best information available, after showing jurisdictional facts, i. e., that taxpayer failed to maintain adequate records and preserve invoices for a period of two years (R. 42). The Bill of Complaint alleges and the demurrer admits that appellees, Commission, its Chairman and the Excise Commissioner, failed to do their statutory duty,

they acted *ultra vires*, they failed and refused to investigate the matter fully before proceeding further under Section 6, Chapter 113, Laws of 1938, when taxpayer petitioned the Commissioner in writing, stating that said assessments were incorrect; that he did not owe said taxes, or any taxes to the State of Mississippi, and denied jurisdiction to make said additional assessments (R. 42). Appellees failed and refused to comply with the proviso contained in Section 6, Chapter 113, Laws of 1938, which is in the following language:

> "Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the Commissioner shall grant a hearing on such petition, and investigate that question fully before proceeding further under this section."

When appellant, taxpayer, filed his petition in writing, pursuant to said Section (6) and the proviso quoted, he met the *prima facie* case against him. It became the bounden duty of the Commissioner to investigate the matter fully before proceeding further.

The decision in the former appeal case, *Viator* v. *State Tax Commission*, 193 Miss. 266, 5 So. (2d) 487, 62 S. Ct. 1109, 62 S. Ct. 1275, is not the law of this case on this appeal, as contended by appellees in their separate statement making against the jurisdiction of this Court, for the reasons that the merits of the case were not passed on. The State court in effect held that taxpayer resorted to an improper remedy; that whether there was evidence before the State Tax Commission on which to base the assessments was not before the Circuit Court of Hinds County and not before the Supreme Court of Mississippi, because on certiorari, the court could consider only errors of law arising or appearing on the face of the record.

The formal judgment entered in the first appeal case (*Viator* v. *State Tax Commission, et al.*, 193 Miss. 266, 5 So. (2d) 487, 316 U. S. 644, 62 S. Ct. 1109, 86 L. Ed. 1728, 316 U. S. 711, 62 S. Ct. 1275) decreed that the appellees have and recover of appellant, taxpayer, the amount of the two additional sales tax assessments, but it is to be interpreted in the light of the court's opinion, findings and conclusions of law. So interpreted it rests wholly on the court's declaration that appellant, taxpayer, misconceived his remedy; that certiorari was an improper remedy, and the court would only consider questions of errors of law arising or appearing on the face of the record. *Metropolitan Water Co.* v. *Kaw Valley Drainage Dist.*, 223 U. S. 519, 523, 32 S. Ct. 246, 247, 56 L. Ed. 533; *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135, 46 S. Ct. 52, 53, 70 L. Ed. 195; *Clark* v. *Williard*, 292 U. S. 112, 118, 54 S. Ct. 615, 617, 78 L. Ed. 1160; *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, 479, 480, 57 S. Ct. 521, 528, 81 L. Ed. 751.

The formal decree entered by the State court in the present appeal case, affirms the decree of the Chancery Court, sustaining demurrer and dismissing the Bill of Complaint, but in the light of the court's opinion, findings and conclusions of law, it rests wholly on the court's declaration that the statutes of the State are correctly construed and applied, and are thus constitutional, and do not deprive taxpayer of due process of law. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 63 S. Ct. 1071, No. 15.

Appellants took the position, then and they take it now, that the complaint of lack of evidence to sustain an administrative order is a question of law.

*Union Tank Line Co.* v. *Wright*, 249 U. S. 275 (holding that taxes must follow realities, not mere deductions from inadequate or irrelevant data); *The Chicago Junction* case, 264 U. S. 258; *Peoria & P. U. R. Co.* v. *United States*, 263

U. S. 528; *I. C. C.* v. *Louisville & N. R. R. Co.*, 227 U. S. 88, and *Lehigh Valley R. Company* v. *United States*, 243 U. S. 412 (holding that orders of administrative tribunals, quasi-legislative and quasi-judicial, must be supported by evidence). In *Florida E. C. R. Co.* v. *United States*, 234 U. S. 167, and *I. C. C.* v. *Louisville & N. R. Co.*, 227 U. S. 88, this Court held that refusal to consider the evidence which was introduced or properly offered for introduction, or to make a material finding without evidence is arbitrary action and an order so made must be reviewed by the courts.

Appellants say that the decision of the State Court in the first case was erroneous, as was pointed out in Suggestion of Error filed in the Supreme Court of Mississippi, and contend now that the decision in this appeal case by the State court is erroneous and that the decision of the first case is not the law of this case and *res judicata*.

In *Durousseau* v. *U. S.*, 6 Cranch 307, 3 L. Ed. 232, the court held that a decision is not an authority upon a question not considered by the court, although involved in a case decided.

*Cromwell* v. *Count of Sac.*, 94 U. S. 351, 352, 353;
*Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48;
*United States* v. *Moser*, 266 U. S. 236, 241.

Here in this present appeal case, the facts are before the court by Bill of Complaint for injunction. The Bill of Complaint alleges and the demurrer admits that appellant taxpayer was proceeded against without evidence, without opportunity to know the state of case against him, without witnesses in his behalf, without being confronted with the witnesses against him and given an opportunity to cross-examine said witnesses, without jurisdiction, without compliance with the statutes, and without a report in writing setting forth a review of the cause and the essential facts

of the matter; that the appellees, Commission, its Chairman and the Excise Commissioner, proceeded against appellant taxpayer contrary to the accepted course of judicial proceeding and taxpayer has never had his day in court, and that no court in the State of Mississippi may judicially determine taxpayer's liability for additional sales tax. The decision of the State court in the first appeal case is erroneous because the assessments were not based on evidence, and the court erroneously held that taxpayer was given an opportunity to overcome by evidence the facts on which the assessments were based. The decision is therefore put upon a basis of fact shown to be without support in the record.

This court is free to investigate all of the facts of this case, and will examine them independently of the State court decision.

> *American F. Ins. Co.* v. *King Lumber, etc., Co.*, 250 U. S. 2, 39 S. Ct. 431, 63 L. Ed. 810, affirming on other grounds 77 So. 168, 74 Fla. 130.

In *Adams* v. *Russell*, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224, the court said:

> "The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plentitude of their powers. It permits no evasion of the state court of the responsibility of determining the federal question if necessary to be determined; * * * The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the federal question necessarily we have to consider."

In *American Sugar Refining Co.* v. *State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102, the court held that a motion to dismiss a writ of error on the ground that no Federal question is involved must be denied where the pro-

tection of the Fourteenth Amendment is invoked in the answer, and the defense is at least plausible on its face.

*Neilson* v. *Lagow*, 12 How. 98, 13 L. Ed. 909;

*Maguire* v. *Tyler*, 8 Wall. 650, 19 L. Ed. 320;

*Klinger* v. *Missouri*, 13 Wall. 257, 20 L. Ed. 635;

*St. Louis, etc., R. Co.* v. *McWhirter*, 229 U. S. 265, 33 S. Ct. 858, 57 L. Ed. 1179;

*Baltimore, etc., R. Co.* v. *Maryland*, 20 Wall. 643, 22 L. Ed. 446;

*Ward* v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751, reversing 68 Okl. 287, 173 Pac. 1050, followed in *Broadwell* v. *Carter County*, 253 U. S. 25, 40 S. Ct. 422, 64 L. Ed. 759, reversing 71 Okl. 162, 175 P. 828.

In *Fox River Paper Co., et al.* v. *Railroad Commission of Wisconsin*, 47 S. Ct. 669, 71 L. Ed., —, this Court held whether State court, in basing decision on non-Federal grounds, has thereby sought to evade constitutional issue, is a question on which litigant is entitled to invoke the judgment of the Supreme Court of the United States, though existence of the right for which constitutional protection is claimed depends on State law.

*Interstate Amusement Co.* v. *Albert*, 239, U. S. 560, 36 S. Ct. 168, 60 L. Ed. 439;

*Watters* v. *Michigan*, 248 U. S. 65, 39 S. Ct. 29, 63 L. Ed. 129, affirming on other grounds 192 Mich. 462, 158 N. W. 865

In *Southern P. Co.* v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 S. Ct. 277, this Court said:

> "The question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error."

To the same effect as *Southern P. Co.* v. *Schuyler, supra,* are *North Carolina R. Co.* v. *Zachary,* 232 U. S. 248, 259, 58 L. Ed. 591, 595, 34 S. Ct. 305; *Carlson* v. *Washington,* 234 U. S. 103, 106, 58 L. Ed. 1237, 1238, 34 S. Ct. 717; *Norfolk & W. R. Co.* v. *West Virginia,* 236 U. S. 605, 610, 59 L. Ed. 745, 35 S. Ct. 437; *Interstate Amusement Co.* v. *Albert,* 239 U. S. 560, 567, 60 L. Ed. 439, 443, 36 S. Ct. 108.

See also *Norfolk, etc., R. Co.* v. *Conley,* 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745, and *Carlson* v. *Washington,* 234 U. S. 103, 34 S. Ct. 717, 58 L. Ed. 1237.

In *Truax* v. *Corrigan,* 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, the court said:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at full liberty to consider them as was the state Supreme Court. Mackay *v.* Dillon, 4 How. 431, 11 L. Ed. 1038; Dower *v.* Richards, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 S. Ct. 452. • • •"

The court said:

> "If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

Continuing in *Truax* v. *Corrigan, supra,* the court said:

> "In view of these decisions, and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state Supreme Court in this regard. • • • A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner

> of the business and the premises of his property without due process, and cannot be held valid under the 14th Amendment."

See also *Fiske* v. *State of Kansas*, 47 S. Ct. 655, 274 U. S. 380, 71 L. Ed. 1108, and *First Nat. Bank of Hartford* v. *City of Hartford*, 47 S. Ct. 462, 273 U. S. 548, 71 L. Ed. 767, reversing 203 N. W. 721, 187 Wis. 290.

*Southern Railway Co.* v. *Virginia*, 290 U. S. 190.

The decision in the present appeal case cannot rest on the independent ground of *res judicata*.

*Southern R. Co.* v. *Clift*, 260 U. S. 316, 43 S. Ct. 126, 67 L. Ed. 283, where the court held that a decision of a State court disposing of a Federal question by following its decision on a former appeal as the law of the case cannot be regarded as resting on the independent non-Federal ground of *res judicata*.

This Court has held that courts of inferior, limited, jurisdiction, must be confined to their statutory duty and authority, and jurisdictional facts must appear of record. That is the law in Mississippi, by a long line of decided cases which have never been deviated from, except in the present appeal case, and appellant, taxpayer, is thus denied the equal protection of the law.

*Galpin* v. *Page*, 85 U. S. (19 Wall.) 21 L. Ed. 959, where the court said:

> "The facts essential to the exercise of a special jurisdiction must appear in such cases upon the record."

The sales tax statute of Mississippi, Sec. 8, Chapter 119, Laws of 1934, as amended by Section 6, Chapter 113, Laws of 1938, confers the only jurisdiction on appellees, Commission, its Chairman, and the Excise Commissioner, to make additional sales tax assessments from "the best information

available" and limits such jurisdiction to cases where it affirmatively appears (a) no returns are made by taxpayers, and (b) where adequate records are not maintained and invoices preserved for a period of two years. Appellant, taxpayer, insisted and claimed he kept adequate records and preserved his invoices for a period of two years. He thus denied jurisdiction of the Commissioner to make additional assessments from the "best information available", or any information. In an unbroken line of decisions, without exception to the decision in the first *Viator* case, the State court held the taxing power was strictly construed, and there was no implied power. In the first *Viator* case the court held the Commissioner had such power as was given him by statute and by necessary implication. The decision is erroneous; it denied appellant, taxpayer, the equal protection of the law.

See *Truax* v. *Corrigan, supra.*

State cases holding the taxing power must be strictly construed are the following:

*Miller* v. *Illinois Cent. R. Co.*, 146 Miss. 422;
*State* v. *Union Tank Car Co.*, 151 Miss. 797;
*Pan American Petroleum Corp.* v. *Miller*, 154 Miss. 565;
*McKenzie* v. *Adams—Banks Lumber Co.*, 157 Miss. 482;
*L. H. Canara Furn. Co.* v. *Miss. State Tax Commission*, 160 Miss. 185;
*Gully* v. *Jackson International Co.*, 165 Miss. 103;
*Town of Utica* v. *State ex rel. Rice*, 166 Miss. 565.

State cases holding "The affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases;" and "The judgments of courts of limited and special jurisdiction, exercisable in a particular manner, are not in and of themselves, evidence of jurisdiction, and its lawful exercise.

In cases of this character the jurisdictional facts must be shown on the face of the record;" are the following:

*Topper Bros.* v. *Buttross*, 178 Miss. 659;

*Whall* v. *Saenger Theatres Corporation*, 200 So. (Miss.) 442;

*Root* v. *McFerring*, 37 Miss. 17, 17 Am. Dec. 49;

*Broom* v. *Board of Supervisors of Jefferson Davis County*, 171 Miss. 586;

*Stamps* v. *Newton*, 3 How. (4 Miss.) 34;

*Green* v. *Creighton*, 10 Sm. & M. (18 Miss.) 159, 48 Am. Dec. 742;

*Dulion* v. *Folkes*, 153 Miss. 91;

*Jackson Equipment & Service Co.* v. *Dunlop*, 172 Miss. 742;

*Welch* v. *Bryant*, 157 Miss. 559;

*Rhodes* v. *New Orleans Great Northern R. Co.*, 91 So. (Miss.) 282;

*Bolivar County* v. *Coleman, et al.*, 15 So. (Miss.) 108, 109;

*Lester* v. *Miller, Sheriff, et al.*, 24 So. (Miss.) 194;

*Garner* v. *Webster County*, 31 So. (Miss.) 211;

*Adams, State Revenue Agent*, v. *First Nat. Bank of Greenwood*, 60 So. (Miss.) 772.

In *Garner* v. *Webster County, supra*, Justice Terral said the order of the board was "stillborn, and had no life from the beginning."

Justice Reed, in *Adams, State Revenue Agent*, v. *First Nat. Bank of Greenwood, supra*, said: "* * * a judgment, void for want of jurisdiction over the subject-matter, may be enjoined in equity."

*Wallace* v. *State ex rel. Tucker*, 61 So. (Miss.) 163;

*Hinton* v. *Perry County*, 79 Miss. 618;

*Henry et al.* v. *Board of Supervisors of Sunflower County*, 71 So. (Miss.) 742, 743;
*Craft* v. *DeSoto County*, 79 Miss. 546, 31 So. 204.

In *Henderson Molpus Co.* v. *Gammill*, 115 So., at pages 719, 720, the court, through Justice Cook, said:

"It is established by a long line of decisions of this court, that, where a court exercises a special, limited, statutory jurisdiction, nothing is presumed in aid of its jurisdiction, but the record of the proceedings must affirmatively show the existence of every jurisdictional fact necessary to authorize it to act; otherwise its proceedings and judgments are void. Board of Supervisors *v.* Ottley, 146 Miss. 696, 107 So. 753; Smythe *v.* Whitehead, 133 Miss. 184, 97 So. 529; Monroe County *v.* Minga, 127 Miss. 702, 90 So. 443; Robertson *v.* Bank, 115 Miss. 840, 76 So. 689; Henry *v.* Board of Supervisors, 111 Miss. 434, 71 So. 742; Robb *v.* Telegraph Co., 104 Miss. 165, 61 So. 170, 977; Adams *v.* Bank, 103 Miss. 744, 60 So. 770; Hinton *v.* Perry County, 84 Miss. 536, 36 So. 565; Bolivar County *v.* Coleman, 71 Miss. 836, 15 So. 107; Marks *v.* McElroy, 67 Miss. 545, 7 7 So. 408."

*Lee et al.* v. *Bassett, et al.*, 121 So. (Miss.) 843;
*Boutwell* v. *Board of Supervisors*, 128 Miss. 337, 91 So. 12;
*King et al.*, v. *Board of Supervisors*, 133 Miss. 501, 97 So. 811.

The Bill of Complaint filed in this appeal case denies the jurisdiction of appellees, Commission, its Chairman, and the Excise Commissioner. The demurrer admits the fact. Without jurisdiction appellant, taxpayer, was denied Due Process of Law.

Appellant, taxpayer, was denied the equal protection of the law. The case against him is the first time in the history of the State that the court decided contrary to the cases

cited above, and many others too numerous to mention here.

The decision of this Court in the former appeal case, 62 S. Ct. 1109, and 62 S. Ct. 1275, has no effect on this appeal. The former appeal case was an appeal from an adverse decision in certiorari proceeding. The State court held the facts were not before the court, and the merits of the case were not decided and adjudicated. The decision in the first appeal case reported in 193 Miss. 266, 5 So. (2d) 487, held one thing and only one thing, as shown by the opinion of the court, copy of which is attached to appellant's jurisdictional statement filed herein. The decision of the state court in the present appeal case is erroneously based on the doctrine of the Law of the case and res judicata. Copy of the opinion of the State court in this present appeal case is also attached to appellant's jurisdictional statement.

The counter jurisdictional statement of appellees, filed herein, fails to conform to and comply with Rule 12, Paragraph 3 of the Court. The motion to dismiss or affirm does not state clearly its object and the facts on which it is based. The counter jurisdictional statement shows that the position of appellants is correct. Appellees admit that additional sales tax assessments can only be made where adequate records are not kept and invoices preserved for a period of two years, citing Section 8, Chapter 119, Laws of 1934, as amended by Section 6, Chapter 113, Laws of 1938. Appellees do not quote evidence from the record, or refer to the record, showing such failure of taxpayer. Copies of the order of appellees, Exhibited with the Bill of Complaint are silent as to jurisdictional facts. The Bill of Complaint charges and the demurrer admits that taxpayer kept adequate records and preserved invoices for two years. Jurisdiction of appellees is thus questioned and put in issue. Without jurisdiction all proceedings against taxpayer are void, and deny him due process of law.

Appellants having attacked the jurisdiction of appellees, Commission, its Chairman and the Excise Commissioner, and denied failure of taxpayer to maintain adequate records and preserve invoices, appellees, were, and are, duty bound to affirmatively prove jurisdiction.

*Ng Fung Ho* v. *White,* 259 U. S. 276;
*Galpin* v. *Page,* 85 U. S. (19 Wall.) 21 L. Ed. 959;

Appellant, taxpayer, alleges, and the demurrer admits, that he cannot pay the tax assessed against him; he does not have the money.

*Matthews v. Rodgers,* 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447;
*Great Lakes Dredge & Dock Co.* v. *Huffman,* 63 S. Ct. 1073;

Section 8, Chapter 113, Laws of 1938 of the General Laws of Mississippi, does not allow recovery of interest on any taxes paid under protest or otherwise. No rate is fixed by the statute. The Mississippi Supreme Court holds that no interest can be recovered.

In *Gulf M. & O. R. Co.* v. *Webster County,* 13 So. (2d) 644-5, the Court, through Chief Justice Smith, said:

> "No interest on the taxes paid by the appellant can be allowed as we have no statute so providing. Moore *v.* Tunica County, 143 Miss. 839, 108 So. 900, City of Indianola *v.* Gates, 181 Miss. 145, 179, So. 284."

In *Moore* v. *Tunica County,* 143 Miss. 839, 108 So. 900, the Court, through Chief Justice Smith, said:

> "The judgment entered by the clerk of this court does not include any interest on the amount recovered, and the appellant has filed a motion to correct that judgment by adding thereto interest on the amount recovered from the date of the refusal of the board of supervisors of the county to pay it. * * * The ques-

tion for decision is: Whether a county, in the absence of a lawful contract therefor, is liable for interest on claims against it. * * * The appellant has not pointed out the statute under which he claims to be entitled to interest against the county, but we presume it is the general statute, section 2678, Code of 1906 (Hemingway's Code, Sec. 2075), which provides that: 'The legal rate of interest on all notes, accounts and contracts shall be six per cent. per annum.' As neither the state nor its political subdivisions are specifically mentioned in this statute, it does not apply to them under the decisions herein last referred to, and which were followed in the cases of Pearl River County *v.* Blodgett, 102 So. 5, and Yazoo City *v.* Taylor, 104 So. 111, recently decided in this court, but in which no written opinions were delivered. The motion will be overruled."

The legislature of Mississippi has never appropriated money to pay interest on taxes erroneously paid or illegally collected. The Mississippi Code of 1930, Section 3276, provides that no such payments can be made without an appropriation. The appropriations statutes (copied in Bill of Complaint, R. 35, 6, 7, 8, 9, 40.) require compliance with Section 3276, Code of 1930.

Section 6, Chapter 113, Laws of 1938, and Section 8, Chapter 113, Laws of 1938, afford taxpayer an election of remedies. They may contest their liability for additional sales tax assessments made against them by the commissioner, incur the risk of damages and penalties, or pay the tax and sue for its recovery. Taxpayer here elected to contest. If he had paid the tax he could not recover interest; if the Attorney General failed or refused to give his opinion, the auditor of public accounts failed or refused to audit the claim, and the Chairman of the State Tax Commission failed or refused to certify as to overpayment (code 1930, Section 3276), taxpayer would be compelled to resort to

mandamus. He could never mandamus the Legislature of the State to appropriate money for the payment of interest. No interest has ever been appropriated, as shown by the appropriations statutes.

Counsel for appellees incorrectly states the effect of the decision of the State court in *Kerr* v. *Stone*, cited in his counter jurisdictional statement. Said case is not authority for what appellees contend, and we here quote from the opinion of the court as follows:

> "The record disclosed that the Commission proposed the additional assessment against the taxpayer, whereupon the latter filed his petition 'for a hearing and a correction * * * of the tax so assessed' pursuant to the provisions of Section 10 of Chapter 119, Laws of 1934. * * * The Commission was acting with full authority in the matter. It was peculiarly within its jurisdiction and the procedure followed was that prescribed by the statute. No question is raised as to the adequacy of the hearing upon the taxpayer's petition. It is true that if the Commission were acting in a matter beyond its jurisdiction (Browning *v.* Matthews, 73 Miss. 343, 18 So. 658; Hinton *v.* Board of Supervisors of Perry County, 84 Miss. 536, 36 So. 565), or in an unauthorized manner (Morgan *v.* Wood, 140 Miss. 137, 106 So. 435), or if the proceedings for the imposition and assessment of the tax were void (City of Meridian *v.* Ragsdale, 67 Miss. 86, 6 So. 619; Ball *v.* City of Meridian, 67 Miss. 91, 6 So. 645), it would have acted 'without authority of law' * * *."

Appellees rest their motion to dismiss or affirm this appeal on two propositions. First, that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Second, that the decision of the State court in the first appeal (*Viator* v. *State Tax Commission*, 193 Miss. 266, 5 So. (2d) 487) is the law of the case and res judicata. As shown in Assignment of Error

Nos. 30-34 the Supreme Court has purposely sought to avoid the jurisdiction of this court. Appellees do not deny the allegations of the Bill of Complaint that the statutes of the state as construed and applied are in conflict with the constitution of the United States, and that the validity of said statutes is drawn in question. They do not deny the federal question was timely raised in the lower court and in the Supreme Court of Mississippi, and that the decision of the State court could not have been reached without deciding it. The decision of the State court is put upon a basis of fact shown to be without support in the record. In the first appeal case the State court held it could not consider the complaint of lack of evidence to sustain the administrative order, and, perforce, in effect, held taxpayer had misconceived his remedy. While the state court affirmed the assessment in the certiorari proceeding in the first case, its judgment must be interpreted in the light of the court's opinion, findings, and conclusions of law, as was said by Mr. Chief Justice Stone, in *Great Lakes Dredge and Dock Co.* v. *Huffman*, 63 S. Ct. 1071.

In *Durosseau* v. *U. S.*, 6 Cranch 307, 3 L. Ed. 232, the court held that a decision is not an authority upon a question not considered by the court, though involved in a case decided.

In the recent case of *Tait* v. *Western Md. Railway Co.*, 289 U. S. 620, Mr. Justice Roberts, at page 623, said:

> "The scope of the estoppel of a judgment depends upon whether the cause arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the later the inquiry is whether the point or question to be determined in the later case is the same as that litigated and determined in the original action. Cromwell *v.* County of Sac., 94 U. S. 351, 352, 353; Southern Pacific R. Co. *v.* U. S.,

168 U. S. 1, 48; United States *v.* Moser, 266 U. S. 236, 241."

If appellant, taxpayer, has no adequate remedy in the state court, as he contends, the constitutional issue raised in this appeal case must be decided by this Court. In *Matthews* v. *Rodgers*, 284 U. S. 521, 52 S. Ct. 217, 76 L. Ed. 447, this court recognized and held that the Federal Courts in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. However, in *Matthews* v. *Rodgers, supra,* the court went on to say that in the absence of allegations in the Bill of Complaint, which were wanting there, of inability of the taxpayer to pay the tax, or of the tax collector to respond to judgment, the Federal Courts would not enjoin the fiscal operations of the State, provided the Federal right asserted may be preserved without it. The question then for decision on the Motion to Dismiss or Affirm, is whether appellant, taxpayer has an adequate remedy in the State court, as charged by appellees. They plant themselves on that proposition, aside from saying the decision in the first appeal case is the law of this case and res judicata, which it is not and cannot be for the reasons shown above. The State court holds that no interest can be recovered in the absence of a statute so providing. *G. M. & O. R. Co.* v. *Webster County, supra,* and *Moore* v. *Tunica County, supra.* The appropriations statutes copied in the Bill of Complaint filed herein, at R. 35, 6, 7, 8, show that no appropriation has been made by the Legislature of Mississippi for the payment of interest and for the payment of taxes unlawfully collected, but only erroneously paid, and that such payments, as can be made, may only be made pursuant to the

provisions of Section 3276 of the Mississippi Code of 1930, copied in appellant's Bill of Complaint, and provided that an appropriation has first been made to pay such refund or refunds. By the express provisions of Section 3276, Code of 1930, which is made a part of each of said appropriation statute, claimant for such refund must make application, and the auditor of public accounts must make careful investigation of such claims and audit such claims against each separate fund in proportion to the amount paid over to such fund in each case, and submit such audited claim with the voucher and evidence on which such claim is based, to the Attorney General for his inspection and approval, and if the Attorney General be of the opinion that such claim should be paid he shall approve the same, and the auditor shall thereupon file such voucher and other papers necessary in each case in his office as a voucher and issue his warrant on the State Treasurer, and in cases of sales tax refunds of taxes erroneously paid, but not unlawfully collected, the chairman of the state tax commission must also certify to such over payment, before any monies can be refunded and paid to taxpayers. Should the Attorney General not be of the opinion that the tax should be refunded, the auditor of public accounts not audit the claim and the chairman of the State Tax Commission not certify to its correctness, the taxpayer would be compelled to resort to mandamus in each instance, and against each of the named officers. Instead of having an adequate remedy at law in the State Court, taxpayer would be compelled to resort to a multiplicity of suits without any assurance of success. Appellees do not, and cannot, point to a single authority of the state Supreme Court sustaining their position that taxpayer has an adequate remedy in the courts of his state.

The Bill of Complaint in this appeal case alleges and the demurrer admits that appellant taxpayer is unable to pay

the tax; he does not have the money. Until such time as he could pay every penny of the sum demanded, he would be without right to maintain an action to recover said tax. In the meantime, his property would be sacrificed and sold and he would be out of business. This is what the Bill of Complaint alleges and the demurrer admits (R. 57, 140).

Opposed to the contention of appellees that Section 10 of Chapter 119, Laws of 1934, amended by Section 8 of Chapter 113, Laws of 1938, provides an adequate remedy to principal appellant and taxpayer, is the appropriation statute of Mississippi copied in the Bill of Complaint and Section 3276 of the Mississippi Code of 1930, as well as the cases of *G. M. & O. R. Co.* v. *Webster County, supra,* and *Moore* v. *Tunica County, supra,* and the fact that the Bill of Complaint alleges and the demurrer admits that taxpayer is unable to pay the tax, because, he says, he does not have the money. Again, in opposition to the Motion to Dismiss or Affirm, and the contention of appellees that Section 10, Chapter 119, Laws of 1934, amended by Section 8, Chapter 113, Laws of 1938, requires the payment of the amount of additional sales tax assessments and suit for their recovery in the Circuit Court of the County of taxpayer's residence, is Section 6, Chapter 113, Laws of 1938, which provides that taxpayer may petition the Commissioner, for a hearing within ten days from receipt of registered notice and demand a hearing, which Section (6) requires the Commissioner to investigate the matter fully before proceeding further. Section 10 as amended by Section 8, Chapter 113, Laws of 1938, covers a different situation, and provides that taxpayer may petition for a hearing before the entire commission and show the amount by which the tax should be reduced. It does not cover a situation where the entire assessment is erroneous and the amount is not owed by taxpayer. It does not attempt to embrace a case where

additional sales tax assessments are made from the best information available by the chairman of the commission for failure of taxpayer to maintain adequate records and preserve invoices for two years. Section 6 deals solely with this appeal case, and the remedy there provided must be applied. The legislative mind having been directed to one subject matter, and that being additional assessments from the best information available, for failure of a taxpayer to maintain adequate records and preserve invoices, that Section must govern over others, not because one Section of a Legislative enactment has more force than others, but because the Legislative mind having been directed to the single subject-matter dealt with in the one must be presumed to govern over others. The Legislature of Mississippi provided an election of remedies to taxpayers against additional sales tax assessments. They may, on the one hand, contest their tax liability with the taxing officials, incur the risk of penalties of twenty-five per cent for the first offense, and fifty per cent for a second offense and interest at the rate of one per cent per month from date said tax is determined to be due and on the other hand, they might elect to pay the tax in the first instance and sue to recover it, incurring the risk only of being cast for costs if unsuccessful.

Questions involved in this appeal case are substantial. They are: Do the state statutes, cited here and quoted in appellants' jurisdictional statement, as construed and applied against appellants, by appellees, Commission, its Chairman and the Excise Commissioner, violate the 14th Amendment to the Constitution of the United States and deny appellants due process of law and equal protection of the law and violate Section Fourteen of the Constitution of Mississippi. It is respectfully submitted that this Honorable Court has jurisdiction in this appeal case under Sec-

tion 237 (a) of the Judicial Code as amended, and the obligatory appellate jurisdiction of this court is invoked to review the decision of the Supreme Court of the State of Mississippi.

Appellants, therefore, respectfully submit that the motion to dismiss or affirm should be overruled, and jurisdiction noted in this appeal case.

Appellants respectfully call the court's attention to the order of Mr. Justice Hugo L. Black, dated October 6, 1943, filed with the Clerk of this court, granting an extention of time within which appellants may apply for Writ of Certiorari and show the court that petition for Writ of Certiorari and accompanying brief will shortly be filed in this court with a certified copy of the transcript of the record as required by the Rules of this Court, in which petition and brief appellants will cover the matter fully, as they will do in their brief on the merits to be filed in this appeal case.

It is, therefore, respectfully submitted that the Motion to Dismiss or Affirm should be overruled.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
*Counsel for Appellants.*

(8634)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 457

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EDDIE J. VIATOR, ET AL.,

*Petitioners,*

*vs.*

R. C. EDWINS, SHERIFF, ET AL.

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

---

ALBERT SIDNEY JOHNSTON, JR.,
*Counsel for Petitioners.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Summary statement of the matter involved | 1 |
| Jurisdiction | 8 |
| Questions presented | 8 |
| Reasons relied on for allowance of the writ | 11 |
| Prayer for writ | 12 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

---

# No. 457

---

EDDIE J. VIATOR, ET AL.,

*Petitioners,*

*vs.*

R. C. EDWINS, SHERIFF, ET AL.

---

## PETITION FOR WRIT OF CERTIORARI.

---

MAY IT PLEASE THE COURT:

The petition of Eddie J. Viator, J. J. Viator, J. A. Viator, C. C. Meyers, and O. Meyers, respectfully shows to this Honorable Court:

A.

### Summary Statement of the Matter Involved.

Respondents, R. C. Edwins, Sheriff of Harrison County, Mississippi, State Tax Commission of Mississippi, A. H. Stone, Chairman, and J. E. Davis, Excise Commissioner, are attempting to collect from Eddie J. Viator, taxpayer, and the sureties on his certiorari bond, additional sales tax for the years 1937 and 1938, alleged to have been made by the chairman of the State Tax Commission under the pur-

ported authority of Section 8, Chapter 119, Laws of 1934, as amended by Section 6, Chapter 113, Laws of 1938, "from the best information available," by reason of the fact that the records kept by taxpayer were not adequate to determine the tax for which he was theretofore liable to the State of Mississippi (R. 79-80).[1] Registered letter demanding the said additional sales tax was received by taxpayer, but copies of returns and assessments were not attached, whereupon he petitioned for hearing before the commissioner, stating that said assessments were incorrect, that he did not owe said additional sales tax, denied jurisdiction of the commissioner to make said additional sales tax assessments (R. 40-46), claiming and stating he kept adequate records and preserved invoices for a period of two years, and requested said commissioner to investigate the matter fully before proceeding further, pursuant to the proviso contained in said Section (6) which is in the following language:

"Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall be petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section."

Taxpayer filed Motion to Quash the assessments because the returns and assessments were not attached, and for other grounds. The Motion to Quash was overruled. The commissioner failed to investigate the matter fully, said he would not investigate it fully or at all. Taxpayer testified before the Commission that he made returns showing all sales tax due the State of Mississippi, that he paid such tax, and did not owe any additional sales tax or any sales tax.

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[1] References are to pages of the Certified Transcript of the Record. The Record has as yet not been printed.

Taxpayer questioned the Field Representatives of the Commission at the hearing. They stated they made the additional assessments against the taxpayer "purposely high to take care of whatever they might be able to find", and made said additional assessments against taxpayer "by comparison with the business of other retail grocers in Gulfport, Mississippi, for the year 1939" (R. 40, 2, 3, 4, 5-46). The Commission refused taxpayer copies of the returns and assessments, and said they would introduce nothing in evidence. They refused to examine taxpayer's books, did not point out wherein they were inadequate and in what manner and in what number he failed to preserve invoices for two years. Nothing was done and no evidence was offered or introduced. However, the taxing authorities offered no other evidence, whatever, in rebuttal of the taxpayer's denial of any indebtedness and the taxing authoritie's final decision was rendered wholly upon the arbitrary conclusions of the Field Representatives aforesaid (R. 42, 3, 4, 5, 6).

Following the hearing before said commissioner, taxpayer appealed to the entire commission, reaffirming his position that the commissioner was without jurisdiction, and that taxpayer did not owe said additional sales tax. With consent of taxpayer, this appeal was heard by the Excise Commissioner (Sec. 1, Chapter 150, Laws of 1938). The Excise Commissioner refused taxpayer's request for subpoenas for witnesses, failed to introduce evidence, failed and refused to permit taxpayer to cross-examine witnesses against him, and made no record of any of the proceedings. At the conclusion of the hearing before the Excise Commission, he, the Excise Commissioner, failed and refused to make a report in writing setting forth a review of the cause and the essential facts of the matter. (Sec. 1, Chapter 150, Laws of 1938) (R. 44-45). Taxpayer's further appeal was then heard by the entire commission, as

shown by Exhibits "B" and "C" to Bill of Complaint (R. 73-78), but his objections went for naught and he was again denied request for subpoenas for witnesses, not confronted with the witnesses against him, nor permitted to offer his books as evidence of their adequacy, the commissioner was not required by the Commission to investigate the matter fully, and the Excise Commissioner not required to introduce evidence, books, records, or other pertinent information, depositions, and report in writing setting forth a review of the cause and the essential facts of the matter (Sec. 1, Chapter 150, Laws of 1938). Instead, the Excise Commissioner wrote the State Tax Commission a "letter" in which he said (R. 79):

"After a full investigation of all evidence and matters presented by the taxpayer, it was the opinion of the Excise Commissioner, and concurred in by the District Supervisor, the Field Auditor and the Attorney for the Commission that the additional tax should remain as assessed."

Jurisdictional facts are not set forth in the "Orders" entered against taxpayer (R. 70-78).

Following entry of final order by the State Tax Commission on the "letter" of the Excise Commissioner, quoted above, taxpayer filed petition for certiorari in the Circuit Court of Hinds County, Mississippi, which affirmed the tax but reduced the penalties from 25% to 15%.

Taxpayer then appealed to the Supreme Court of Mississippi, again pointing out the lack of jurisdiction, and contended the statutes of the State, as construed and applied by the Commissioner, the Excise Commission and the State Tax Commission were unconstitutional, null and void, and violated the 14th Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi. He contended that Orders of Quasi-judicial commissions and bodies must be supported

by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi.

The State court affirmed the assessment and held that whether there was evidence before the State Tax Commission upon which to base the additional assessments was not before the Circuit Court of Hinds County and not before the Supreme Court of Mississippi, because on certiorari the court could only consider errors of law arising or appearing on the face of the record. Notwithstanding, the Supreme Court of Mississippi held:

"• • • The taxpayer was given an opportunity both by the chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based."

The court said:

"The order of the State Tax Commission being simply one approving the assessment made by its chairman, it was not necessary for it to again set forth the facts on which the assessment was made."

In disposing of taxpayer's attack upon the jurisdiction of the chairman and the Excise Commissioner, denying their jurisdiction to make additional assessments against him without affirmatively showing he failed to maintain adequate records and preserve invoices for two years, the State court said:

"The right and duty of the Commission to make an additional assessment or return of the taxpayer's sales in addition to that returned by him, is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records, in Sec-

tion 6 of the statute, is to permit the Commissioner, when the taxpayer's records are inadequate, to determine the correctness of the return made by him 'from the best information available.' "

The State court attempts to dispose of appellant's attack on the former judgment, sought to be enjoined in this appeal case, by holding that the demurrer did not admit the allegations of the Bill as to the irregularity of the former proceeding, and as to the invalidity of the judgment, which the State Court says are mere conclusions of law.

The State court goes on to say:

"The instant proceedings therefore constitutes an attempt to show what might have been shown in the former case. The conditions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment."

In the first appeal case (*Viator* v. *States Tax Commission, et al.*), the State court held it could not consider the lack of evidence to sustain the assessments. When the facts of the matter are brought before the State court by Bill for Injunction, it holds the decision in the first appeal case is the law of this case and res judicata.

Taxpayer then appealed to this court and his appeal was denied for want of jurisdiction. Treating the papers as an application for certiorari under Section 237 (c), Judicial Code, certiorari was denied. (316 U. S. 644). Petition for rehearing was also denied. (316 U. S. 711).

This present appeal is from an adverse decision of the Supreme Court of Mississippi, affirming the decree of the Chancery Court of Harrison County, Mississippi, sustaining demurrer to Bill of Complaint to enjoin the collection of the tax and the execution of the judgment of Hinds

County, Mississippi. (R. 4-68). The facts alleged in the Bill of Complaint are admitted by demurrer. (R. 100-102). The Supreme Court of Mississippi affirmed, holding that the decision in the first appeal case, reported in 193 Miss. 266, 5 So. (2d) 487, is the law of the case and res judicata (R. 166-167).

Appellants contend that the state statutes, as construed and applied against them, are unconstitutional, deny them due process of law and the equal protection of the law, and violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi.

Petitioners say they were proceeded against without compulsory process for witnesses in their behalf, without opportunity to know the state of case against them, without copies of the returns and assessments mentioned in the registered letter of December 8, 1940, having been furnished, without the additional assessments having been introduced in evidence, or otherwise shown to taxpayer, without evidence, without a report in writing setting forth a review of the cause and the essential facts of the matter, and the right of respondents to thus proceed, is challenged by petitioners, who contend before this Court that the State statutes, as construed and applied against them, permitted the arbitrary exercise of power, a departure from the accepted course of judicial proceeding, without due process of law and the equal protection of the law, and said statutes are thus unconstitutional and violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi.

Appellants allege and show they have no adequate remedy in the courts of the State of Mississippi; State statutes do not allow recovery of interest, no appropriation has ever been made by the Legislature of Mississippi to pay interest and taxes unlawfully collected but only taxes erroneously

paid, and then only after "proper application," audited by the Auditor of Public Accounts, opinion of the Attorney General that it should be paid, and certificate of the Chairman of the State Tax Commission of Mississippi as to overpayment. Taxpayer alleges, and the demurrer admits, that he is unable to pay the tax; he does not have the money (Section 3276, Code of 1930) (R. 57, 140) (R. 35-40).

B.

**Statement of Basis upon Which the Court Has Jurisdiction to Review the Decree in Question.**

A final decree has been rendered by the highest court of the State of Mississippi in which a decision could be had, and there is drawn in question the validity of statutes of the State of Mississippi (Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938) on the ground of their being repugnant to the Constitution of the United States, and more particularly the Fourteenth Amendment. Petitioners claim and show that the statutes of the State, as construed and applied against them, and now attempted to be enforced against them, deprive them of due process of law and the equal protection of the law, and claim that this Court has jurisdiction to review the decree of the Supreme Court of Mississippi, pursuant to the provisions of Section 237(b) of the Judicial Code, as amended.

C.

**The Questions Presented.**

May the state court proceed against taxpayer under Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, of the General Laws of Mississippi, and permit the collection of additional sales tax for the years

1937 and 1938, alleged to have been made from the "best information available," for the alleged failure of taxpayer to maintain adequate records, when and where taxpayer denied and challenged jurisdiction, without affirmatively showing jurisdiction so to do, and without requiring the officers charged with the duty of enforcing said laws to afford petitioning taxpayer an adequate hearing, at which evidence must be introduced, taxpayer permitted to cross-examine witnesses against him, know the state of case against him, and examine returns and assessments made against him, and without a report in writing setting forth a review of the cause and the essential facts of the matter?

May the State court ignore the reasons given in Registered Letter to taxpayer, by the Commission, its Chairman, and the Excise Commissioner, for making additional sales tax assessments against taxpayer, and permit the Commission, its Chairman, and the Excise Commissioner to resort to other means than shown, and the State court to inferentially say the assessments were made for other reasons that do not appear?

May the State court deny the claim of constitutional right, by holding in this appeal case that its decision in the first appeal case is the law of the case and res judicata where in said first appeal case the State court held it could not consider the claim of lack of evidence to support the administrative order, because on certiorari proceeding it could only consider errors of law arising or appearing on the face of the record?

May the State court purposely evade the decision of the Federal question, to prevent a review by this Court, by resting its decision on grounds not adequate to support it?

May the decision of the State court rest on grounds shown to be without support in the record?

May petitioners attack upon the State statutes, as construed and applied against them, go unanswered, and their

claim that the State statutes as construed and applied against them, are unconstitutional, null and void, and violated the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi, be disposed of by demurrer to sworn Bill of Complaint and exhibits, admitting all of the facts alleged in said bill, factually showing and proving their claim of constitutional right, and by decision of the State court that the decision in the first appeal case is the law of this case and res judicata when the State court held in the first appeal case that it could not and would not pass upon the merits of the case?

May taxpayer's claim of constitutional right, and his challenge of the State statutes, as construed and applied against him, and now attempted to be enforced against him and the sureties on his certiorari bond, as violating the 14th Amendment to the Constitution of the United States, and Section Fourteen of the Constitution of Mississippi, go unheeded and unanswered when petitioners show that they have no adequate remedy in the State court, the Bill of Complaint alleges taxpayer is unable to pay the tax; he does not have the money, and the demurrer admits the fact, and the Legislature of Mississippi has not appropriated money to pay taxes unlawfully collected, interest on the amount of said taxes, and the law of Mississippi requires taxpayer to file a proper claim, the Auditor of Public Accounts to audit the claim, the Attorney General to be of the opinion that said taxes should be repaid, and the Chairman of the State Commission to certify to overpayment?

May the proviso contained in Section 6, Chapter 113, Laws of 1938, permitting taxpayer to file petition in writing, enjoining on the Commissioner the duty to grant a hearing and investigate that question fully before proceeding further under that section (6), be ignored and violated, and

taxpayer denied the hearing provided by the legislature of Mississippi?

Whether the proceedings against taxpayer, factually detailed in sworn Bill of Complaint, admitted by demurrer, deprive him of Due Process of Law?

Whether the proceedings against taxpayer, factually detailed in sworn Bill of Complaint, admitted by demurrer, deprive him of the equal protection of the law?

Whether the proceedings against petitioners, shown by sworn Bill of Complaint, admitted by Demurrer, deprive them of Due Process of Law and the Equal Protection of the Law?

Whether the proceedings, orders, judgment and decree, against taxpayer and petitioners, were taken and had, made, rendered and entered with jurisdiction of the person and subject-matter, and afford them Due Process of Law and the Equal Protection of the Law, guaranteed by the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi?

Whether the State statutes complained of, as construed and applied against petitioners, by the Commission, its Chairman and the Excise Commissioner of the State Tax Commission of Mississippi, and the State court, afford petitioners Due Process of Law and the Equal Protection of the Law?

## D.

### Reasons Relied On for the Allowance of the Writ.

1. The State court has decided the Federal question involved in this cause, in a way probably not in accord with applicable decisions of this court.

2. The State court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court and by an inferior,

quasi-judicial tribunal, as to call for an exercise of this Court's power of Supervision.

3. The State court has decided an important question of local law in a way in conflict with applicable local decisions.

4. The State court has decided an important question of general law in a way untenable, and in conflict with the weight of authority.

5. The State court has, in effect, decided a federal question in a way probably in conflict with applicable decisions of this Court.

6. The State court purposely avoided expressly deciding the federal question.

7. The decision of the State court could not have been reached without deciding the federal question.

8. The factual basis of the State court's decision is without support in the record.

9. The effect of the State court decision, if permitted to stand, is to affirm a judgment arbitrarily rendered, without jurisdiction, over the objection of Petitioners, without evidence, and without giving Petitioners an opportunity to be heard in their defense.

10. The State court decided a Federal question of substance, not in accord with applicable decisions of this Court.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Mississippi, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and

entitled on its docket, #35,405, Eddie J. Viator, et al., appellants, *v.* R. C. Edwins, Sheriff, etc., et al., appellees, and that the said decrees of the Supreme Court of Mississippi may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

EDDIE J. VIATOR,
J. J. VIATOR,
J. A. VIATOR,
C. C. MEYERS,
O. MEYERS,
By ALBERT SIDNEY JOHNSTON, JR.,
*Counsel for Petitioners.*

## Subject Index.


| | Page |
|---|---|
| Brief in support of petition for writ of certiorari | 19 |
| I. The Opinions of the Court Below | 19 |
| II. Jurisdiction | 20 |
| III. Statement of the case | 22 |
| IV. Specification of Errors | 25 |
| Provisions of Challenged Statutes | 28 |
| V. Argument | 31 |
| Summary of argument | 30 |
| Points 1, 2, 3, 4, 5, 6, 7. Conflict with prior Federal and state court decisions | 30,31 |
| (1) Without jurisdiction, taxpayer was denied Due Process | 31 |
| (2) Orders of Quasi-judicial Bodies and Commissions must be supported by Evidence | 34 |
| (3) Orders of Quasi-judicial Bodies and Commissions must be supported by a Finding of Basic Facts, otherwise they are Unconstitutional, and deny Due Process | 36 |
| (4) Tax on Person's Income or Property Cannot be measured by reference to Another's Income or Property | 45 |
| (5) Unless taxpayer has adequate remedy in State Court, he has Right to Challenge state statutes in Supreme Court of United States, because in violation of Federal Constitution | 46 |
| (a) Letter from Attorney for State Tax Commission advising refund of state taxes is dependent upon discretion of state Attorney General | 47 |
| (6) Where Taxpayer is unable to pay challenged state tax, he is entitled to appeal to the Federal Supreme Court | 48 |

Page

(7) Where state statutes provide for hearing, and hearing is inadequate or manifestly unfair, action of state is arbitary and unconstitutional, null and void ..... 53
State cases holding Excise tax statutes are to be construed in favor of taxpayer, and against taxing authority ..... 55
Summary of conclusions ..... 58
Conclusion and Prayer for Writ of Certiorari ... 59

## Table of Cases Cited.

*Adams, State Revenue Agent* v. *First Nat. Bank of Cleveland*, 193 Miss. 774, 60 So. 772 ..... 34
*American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U. S. 372-30 ..... 21
*Atchison T. & S. R. Co.* v. *United States*, 295 U. S. 193, 201, 202 ..... 35,36,53
*Bollman, Ex parte*, 4 Cranch, 75 ..... 33
*Borden* v. *Fitch*, 15 Johns (N. Y.) 141 ..... 32
*Bratton* v. *Chandler*, 260 U. S. 110 ..... 44
*Browne* v. *Keene*, 8 Pet. 112, 115 ..... 33
*Canara, L. H., Furniture Co.* v. *Miss. State Tax Commission*, 160 Miss. 185 ..... 55
*Chicago Junction Case, The*, 264 U. S. 258 ..... 35
*Cobert* v. *State*, 86 Miss. 769, 39 So. 65 ..... 48
*Coe* v. *Armour Fertilizing Works*, 237 U. S. 413, 419 .... 32,44
*Earle* v. *McLeigh*, 1 Otto (91 U. S.) 503, 23 L. Ed. 398. 32
*Elliott* v. *Peirsol*, 1 Pet. 328 ..... 33
*Florida E. C. R. Co.* v. *United States*, 234 U. S. 167 ..... 35,53
*Frank* v. *Mangum*, 237 U. S. 309, 340 ..... 45
*Galpin* v. *Page*, 85 U. S. (19 Wall.) 21 L. Ed. 959 ..... 33
*Great Lakes Dredge & Dock Co.* v. *Huffman*, 63 Sup. Ct. 1073 ..... 47,48
*Gully* v. *Jackson International Co.*, 165 Miss. 103 ..... 54
*Hanford* v. *Davies*, 163 U. S. 273, 279 ..... 33
*Henderson Molpus Co.* v. *Gammill*, 115 So. 719, 720, 149 Miss. 600, 603 ..... 34

Page

*Hoeper* v. *Tax Commission of Wisconsin et al.*, 284 U. S. 206, 52 Sup. Ct. 120 ..... 45
*Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91 ..... 35,38,53
*John Valley* v. *Northern F. & M. Co.*, 254 U. S. 348 ... 33
*Jones* v. *United States*, 137 U. S. 202, 211 ..... 33
*Kentucky* v. *Powers*, 201 U. S. 1 ..... 33
*Kwork Jan Fat* v. *White*, 253 U. S. 454 ..... 53
*Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412 ... 35
*Mahler* v. *Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 288, 68 L. Ed. 549 ..... 41
*Matthews* v. *Rodgers*, 284 U. S. 521, 52 Sup. Ct. 217, 76 L. Ed. 447 ..... 47
*Miller* v. *Illinois Cent. R. Co.*, 146 Miss. 422 ..... 55,57
*Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, 21, 22 ..... 35,53
*McKenzie* v. *Adams-Banks Lumber Co.*, 157 Miss. 482 .. 55
*Ng Fung Ho* v. *White*, 259 U. S. 276 ..... 34
*Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U. S. 8 .. 33
*Pan American Petroleum Corporation* v. *Miller*, 154 Miss. 565 ..... 55
*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, 55 Sup. Ct. 241 ..... 40
*Peoria & P. U. R. Co.* v. *United States*, 263 U. S. 528 .. 35
*Powell* v. *Alabama*, 287 U. S. 45, 68 ..... 31,45
*Railroad Co.* v. *Clarke*, 95 Miss. 689 ..... 56
*Scott* v. *McNeal*, 154 U. S. 34, 46 ..... 32,33
*State* v. *Cole*, 81 Miss. 174, 32 So. 314 ..... 48
*State* v. *Union Tank Car Co.*, 151 Miss. 797 ..... 55
*State ex rel. Collins, Attorney General* v. *Grenada Cotton Compress Co.*, 123 Miss. 191 ..... 56
*State, ex rel., Rice, Attorney General* v. *Louisiana Oil Corporation*, 174 Miss. 585 ..... 56
*Stuart* v. *Palmer*, 74 N. Y. 183, 190 ..... 53
*Tampa Suburban R. Co.*, 168 U. S. 583 ..... 21
*Twining* v. *New Jersey*, 211 U. S. 78, 110 ..... 31
*Town of Utica* v. *State, ex rel., Rice*, 166 Miss. 565 ..... 53
*U. S.* v. *Abilene & Southern Ry.*, 265 U. S. 274 ..... 35,39,53

Page

*United States* v. *Hudson*, 7 Cranch., 32, 33 ..... 33
*Viator* v. *State Tax Commission*, 316 U. S. 644, 711, 193 Miss. 266, 5 So. (2d) 487, 62 Sup. Ct. 1109, 62 Sup. Ct. 1275 ..... 25,35
*Washington, ex rel. Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510 ..... 44
*West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio*, 294 U. S. 63 ..... 35,53
*Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59 Sup. Ct. 51, 55, 67 L. Ed. 124 ..... 41
*Whitfield* v. *Hager*, 222 Fed. 745 ..... 53

STATUTES CITED.

Constitution of the United States, 14th Amendment 4,7,11,25,30,45
Judicial Code, Section 237(b) ..... 20
Laws of Mississippi of 1938:
Chapter 113, Section 6 ..... 20,28,54
Chapter 113, Section 8 ..... 20,49
Chapter 150, Section 1 ..... 20,21,28,42,54
Chapter 28 .....
Laws of Mississippi of 1940:
Chapter 81 ..... 48
Laws of Mississippi of 1942:
Chapter 11 ..... 48
Mississippi Code of 1930, Section 3276, as amended by Chapter 260, Laws of 1938 ..... 49

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 457

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EDDIE J. VIATOR, ET AL.,

*Petitioners,*

*vs.*

R. C. EDWINS, SHERIFF, ETC., ET AL.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### The Opinions of the Court Below.

The opinion of the Supreme Court of Mississippi, in *Viator* v. *State Tax Commission, Et Al.*, is reported in 193 Miss., 266, 5 So. (2d) 487. The opinion of the Supreme Court of Mississippi, in *Viator Et Al.* v. *R. C. Edwins, Sheriff, Etc., Et Al.*, dated June 7, 1943, is not officially reported in the State reports, but may be found in 13 So. (2d) 212-213. The opinions of the Supreme Court of Mississippi appear at R. 166-167 and 168-172. Per Curiam request of the Supreme Court of Mississippi for briefs on the Federal question appears at R. 173-174.

## II.

### Jurisdiction.

1. Sec. 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, et seq.

2. The date of the decree to be reviewed is June 7, 1943 (R. 166-167). Suggestion of Error was filed in the State court and overruled on July 9, 1943. (R. 129a) Application for Extension of Time within which to apply for Writ of Certiorari was presented to Mr. Justice Hugo L. Black. Order granting an extention of 34 days was signed by Mr. Justice Black on October 6, 1943. Said Order was filed with the Clerk of this Court and will be printed by him with the Petition for Writ of Certiorari and Accompanying Brief.

3. Petitioners launched their attack upon the validity of the State statutes (Sections 6 and 8, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938) as construed and applied against them, by sworn Bill of Complaint (R. 4-68), by Assignment of Errors (R. 115-129), and by Suggestion of Error (R. omitted by Clerk of State Court), filed in the state court, and attack the validity of said statutes, as construed and applied, by Assignment of Errors (R. 130-141) filed in this Court. The Chancery Court of Harrison County, Mississippi sustained demurrer to said Bill (R. 104-105). The State Supreme Court affirmed, holding that the decision of the first appeal case was the law of the case, and res judicata (R. 166-167). The decision of the State Court could not have been reached without deciding the Federal question. The factual basis of the State Court's decision is without support in the record (R. 4-68). The State Court purposely avoided deciding the Federal question to prevent an appeal to this Court and re-

view by certiorari. Petitioners show that taxpayer did not have his day in court, that he was proceeded against arbitrarily, capriciously, without evidence, without jurisdiction, without opportunity to know the state of case against him, without subpoenaes for witnesses in his behalf, without opportunity to cross-examine witnesses against him, without the introduction of any evidence by respondents, without the right to present to a judicial court his claim of constitutional fact, without a report in writing setting forth a review of the cause and the essential facts of the matter required by Section 1, Chapter 150, Laws of 1938, and because without such finding of essential fact his appeals from the additional sales tax assessments against him, first to the Excise Commission, and then to the entire Commission, were a farce, the latter not having heard the case, could not decide it without such report in writing setting forth a review of the cause and the essential facts of the matter. The Field Representatives of the Commission having admitted before the Excise Commissioner that they made the assessments against taxpayer purposely high to take care of whatever they might be able to find, and by comparison, comparing the business of taxpayer for the years 1937 and 1938, because of which the additional assessments are said to have been made, with the business of other merchants in the year 1939, petitioners contend and show that taxpayer was proceeded against arbitrarily, capriciously, and without foundation in fact, and he was denied Due process of Law.

4. Cases believes to sustain the jurisdiction of this Court to review this case on Writ of Certiorari, as required by Rule 12, Paragraph 1, are the following:

*Tampa Suburban R. Co.*, 168 U. S. 583;

*American Const. Co.* v. *Jacksonville T. & K. W. R. Co.*, 148 U. S. 372-30.

## III.

### Statement of the Case.

On September 10, 1939, appellees, Commission, its Chairman, etc., demanded $833.00 additional sales tax from Eddie J. Viator, taxpayer. On September 22, 1939, they demanded $1,462.00. On December 8, 1940, they demanded $2,999.98. Taxpayer petitioned in writing for the hearing provided by Section 6, Chapter 113, Laws of 1938. The Commissioner failed and refused to investigate the matter fully; said he would not investigate it fully or at all. Taxpayer introduced witnesses and showed appellees made the assessments purposely high to take care of whatever they might be able to find, and by comparison, comparing the business of taxpayer in the years 1937 and 1938 with that of other merchants in Gulfport in 1939. No subpoenaes were allowed taxpayer for witnesses in his behalf. Appellees failed and refused to introduce any evidence; said they would not introduce any, and said they did not have to introduce evidence. The orders made against taxpayer are contrary to the indisputable character of the evidence introduced by him, showing that he kept adequate records and preserved invoices for a period of two years, that he paid all sales tax due the State of Mississippi, and did not owe any additional sales tax. Appellees refused taxpayer a bill of particulars of their demand, refused to permit his interrogatories to be answered, gave him no opportunity to know the state of the case against him, introduced no witnesses, gave taxpayer no opportunity to cross-examine witnesses, refused to inform taxpayer of the nature of their demand, made and introduced no assessments, gave him no copy of the returns and assessments claimed to have been made against him and which their registered demand said were attached but which were not attached (R. 4-68).

Appellees' registered demand for additional sales tax from taxpayer states the additional assessments are made "from the best information available" and "by reason of the fact that the records kept by him were inadequate to show the amount of tax for which you were heretofore liable under the law." Taxpayer denied he failed to maintain adequate records and failed to preserve his invoices for two years. He denied that the additional sales tax assessments were made from the "best information available." He showed said assessments were made purposely high to take care of whatever appellees might be able to find and by comparing the business of taxpayer in the years 1937 and 1938 with the business of other merchants in the year 1939. Taxpayer showed he kept adequate records and preserved invoices. Appellees made photostat copies of taxpayer's records but did not introduce them in evidence.

The State court ignored the reasons given in the registered notice of the demand for additional sales tax, in which notice appellees claim and state said additional assessments were made from the best information available, and by reason of the fact that the records kept by taxpayer were inadequate to determine the amount of tax for which he was liable. The State court inferentially held the additional assessments were made for reasons other than those stated in the registered demand, and gave the taxpayer no opportunity to know upon what said assessments were based.

When questioned, appellees admitted said additional assessments were made purposely high to take care of whatever they might be able to find and by comparing the business of taxpayer for the years 1937 and 1938, because of which these additional assessments are alleged to have been made, with the business of other merchants in the year 1939.

The State court held it could not consider the evidence or lack of evidence, and whether there was evidence before

the State Tax Commission was not before the Circuit Court of Hinds County and not before the Supreme Court of Mississippi, because on certiorari it could only consider errors of law arising or appearing on the face of the record. Nevertheless, when taxpayer showed the facts by sworn Bill to enjoin the collection of the tax and the judgment of the Circuit Court of Hinds County, affirmed by the Supreme Court of Mississippi, the State court held the former decision was the law of the case and res judicata.

Appellants say the state court purposely avoided deciding the Federal question of want of due process, in order to avoid an appeal to the Supreme Court of the United States. Appellees say the decision of the State court is put upon a basis of fact without support in the record, and that the non-Federal ground is not broad enough to support the decision of the State court.

Appellants contend that taxpayer has not had his day in court. He has been proceeded against without due process of law. Taxpayer was denied a hearing in a constitutional sense. The hearing given him was inadequate, manifestly unfair, and calculated to prevent any court knowing upon what the additional assessments in this appeal case are based, beyond what appellees say that taxpayer owes the tax, and must pay it and then sue to recover it. Appellants say they have no adequate remedy in the State court, taxpayer cannot recover interest on any taxes he may pay, he cannot recover interest without an appropriation by the Legislature; the Legislature has never appropriated interest; the appropriation statutes of Mississippi provide that a proper claim must be filed, it must be audited, the Attorney General must give his opinion that the tax should be repaid taxpayer, and the Chairman of the Commission must certify to overpayment. Taxpayer says that such is not an adequate remedy, and that his claim of constitu-

tional right is not preserved by the State of Mississippi in this case.

Taxpayer claims he was denied the equal protection of the Law. Every decided case in Mississippi, with the exception of that in the first appeal case (*Viator* v. *State Tax Commission*, 316 U. S. 644 and 711) held there was no implied power to tax. Nevertheless, the State Court held in 193 Miss. 266, that the Commission had such power as was given by the Legislature expressly, and by necessary implication. Every decided case in Mississippi, holds that jurisdictional facts must affirmatively appear of record. In the first Viator appeal case, the State court held it was unnecessary for the Commission to show the facts upon which the assessments against taxpayer were based.

The decided cases in Mississippi, with the exception of this appeal case and *Viator* v. *State Tax Commission*, 193 Miss. 266, hold that execution of judgments void for want of jurisdiction, may be enjoined.

Taxpayer did not have the protection of his day in court. He was denied the protection of the General Law. He was not heard before he was condemned.

Page references are shown and the facts more fully set out in Petition for Writ of Certiorari.

### Specification of Assigned Errors to Be Urged.

The Assignment of Errors, all of which will be urged, will be found in the record at Pages R. 131 to 141 [1]

The following is a summary of the points upon which appellant's contentions may be grouped:

The challenged Mississippi Statutes, as construed and applied, violate the 14th Amendment to the Constitution of

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[1] Reference to the pages of record are to the unprinted transcript of the record made by the Clerk of the State Court. The certified Transcript of the Record has not yet been printed.

the United States, by permitting the arbitrary exercise of power by State Officers, proceedings without showing of jurisdictional facts, contrary to and beyond the registered notice of the demand for additional sales tax.

The challenged Statutes are void because they were construed and applied, and are now attempted to be enforced without evidence, and without a finding of fact.

The Mississippi Statutes, as construed and applied, are specially arbitrary in taxing appellant, taxpayer, by comparing his business for the years 1937 and 1938, because of which the additional sales tax assessments are claimed to have been made, with the business of other merchants in Gulfport, Mississippi, during the year 1939. Such conclusion is purely arbitrary and the assessments attempted to be enforced against taxpayer and appellants rest wholly upon such arbitrary conclusions, contrary to the indisputable character of the evidence introduced by taxpayer that he did not owe the amount of the additional assessments and that he had paid all sales tax owed by him to the State of Mississippi.

The Mississippi Statutes, as construed and applied, permit appellees, Commission, its Chairman, and the Excise Commissioner, to give notice by registered mail of a demand for additional sales tax from the best information available, based on taxpayer's failure to maintain adequate records and preserve invoices, and yet when taxpayer shows he maintained adequate records and preserved invoices, and such additional assessments were not made from the best information available, to be assessed by the appellees and the State court attempting to say that said additional sales tax assessments are made for other reasons that do not appear of record, and contrary to the reasons given in said registered demand.

The challenged Mississippi Statutes, as construed and applied by appellees and the State Court, deprive taxpayer and appellants of their day in court; they permit proceedings against taxpayer without informing him of the state of case against him, on anonymous informations, not disclosed in the notice by registered demand, and the State court to hold that said additional sales tax assessments may be sustained without a showing of jurisdiction, for reasons that do not appear, without evidence, contrary to the indisputable character of the evidence offered by taxpayer, and without a finding of fact upon which any court may know the reasons for making said assessments, and that they are, in truth and in fact, correct.

The State Statutes cannot be maintained without conceding to the State of Mississippi a corresponding power in other forms of taxation such as income, franchise and ad valorem, the effect of which would be to permit the State to take the property of persons without due process of law, without the equal protection of the law, and to bankrupt any persons subject to the taxing laws of Mississippi, as construed and applied, because, no matter what the amount of the tax demanded, the taxing authorities of the State may require payment, and then force the taxpayer to sue for its recovery.

The effect of the State Statutes, as construed and applied, prevent taxpayer from recovering interest, and before maintaining any suit to file a proper claim, have the same audited by the Auditor of Public Accounts, obtain the opinion of the Attorney General that the tax should be recovered, and further secure a statement of overpayment by the Chairman of the State Tax Commission, when and where the law of Mississippi prohibits the refunding of any taxes without such requirements, and without an appropriation by the Legislature.

**Provisions of Challenged 1938 Statutes.**

The provisions of the challenged Statutes are set out in full in the Jurisdictional Statement of appellants and further appear in the appendix to this brief.

Section 6 of Chapter 113, Laws of 1938, requires taxpayer to maintain adequate records and preserve invoices for a period of two years. If, and only if, as and when, taxpayer fails to maintain adequate records and preserve invoices, the Commissioner may make additional assessments from the best information available. In order to make a prima facie case against a taxpayer subject to the provisions of the 1938 statute, the Commissioner is further required to give notice by registered mail of demand for said additional sales tax, and furnish copies of his returns and assessments to the taxpayer. It is the returns and assessments that are made prima facie correct and not the demand by registered mail. If a prima facie case is made, by compliance with the Statutes, it is met when taxpayer petitions for a hearing, as, in that event, the Commissioner is required to investigate the matter fully before proceeding further.

The proviso in Section 6, Chapter 113, Laws of 1938 enables and permits taxpayer to petition in writing for a hearing and when such is done, the commissioner is enjoined to investigate the matter fully before proceeding further.

Chapter 150 of the Laws of 1938, copied in the Jurisdictional Statement of appellants, and further shown in the appendix to this brief, permits taxpayer's appeal from the decision of the Chairman of the Commission to be heard by the Excise Commissioner and requires that official to take the testimony of witnesses, take depositions, with power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and make copies of same. At the conclusion of the hearing, the Excise Commissioner is duty bound to submit

all written evidence, documents, records and other pertinent information to the other members of the Commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. The Statute provides that the Excise Commissioner *shall* perform the duties mentioned.

The effect of the Mississippi Statutes, as construed and applied, is not only to additionally assess taxpayer for a large amount of sales tax, over his objection, without affirmatively showing jurisdiction so to do, without evidence, and without a finding of fact, but to place taxpayer in the position of having receipts in excess of $150,000.00, over and above the taxable income previously reported by him, and because of which he could be condemned to pay approximately $84,000.00 of Income Tax to the State and Federal Governments.

This case is appealed to this Court from an adverse decision of the State court affirming the decree of the Chancery Court of Harrison County, Mississippi, sustaining demurrer to the Bill of Complaint filed to enjoin the collection of the additional sales tax assessed against taxpayer for the years 1937 and 1938, which demand eventuated in an adverse decision and judgment in certiorari proceeding instituted by taxpayer, affirmed by the Supreme Court of Mississippi, and appealed to this Court, and dismissed for want of jurisdiction. The facts of the case are detailed in sworn Bill of Complaint, and admitted by demurrer. Nevertheless, the State Court affirmed, holding that the decision in the certiorari case was the law of the case and *res judicata.* As shown in the opinion of the State court in the first appeal case, the State court held it would not consider the lack of evidence to sustain the additional assessments, and pretermitted a decision on the merits of the case. Notwithstanding, the State court held the taxpayer was given an opportunity to overcome by evidence the facts upon which the

assessments were made. The effect of the State court decisions is to hold constitutional the challenged Statutes of Mississippi.

**Summary of Argument.**

(1) The Registered demand made on taxpayer, copy of which is Exhibit "D" to the Bill of Complaint, shown at pages 79-80 of the Certified Transcript of the Record, is the measure of the jurisdiction against taxpayer to make additional sales tax assessments, for the years 1937 and 1938. Jurisdictional facts must affirmatively appear from the face of the record. Taxpayer denied the jurisdiction. He claimed he kept adequate records and preserved his invoices for a period of two years. Without jurisdiction of the subject-matter, taxpayer is denied Due Process of law, and the Orders and judgment against him are null and void.

(2) Orders of quasi-judicial tribunals, commissions and bodies must be supported by evidence. Unless they are based on evidence, they are unconstitutional, null and void.

(3) Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States.

(4) Attempt by state to measure tax on person's property or income by reference to another's property or income is contrary to due process, and violates the Fourteenth Amendment to the Constitution of the United States.

(5) Where, as in this appeal case, taxpayer has no adequate remedy in the State courts, State statutes do not allow recovery of interest, no appropriation has ever been made by the Legislature of Mississippi to pay interest, the statute does not fix the rate, the State court holds no interest can be paid, and recovery, in any event, is made to depend upon the discretion of the Attorney General and the Chairman of

the State Tax Commission, taxpayer is entitled to enjoin the collection of the challenged tax, particularly where the Federal right asserted cannot be preserved otherwise.

(6) State statute permitting recovery of unconstitutional tax, does not afford adequate remedy where taxpayer is unable to pay the tax because he does not have the money, and the tax collecting officer is unable to respond to judgment.

(7) Where State statutes provide for a hearing, and inadequate and unfair hearings are granted Orders so made are unconstitutional, null and void, and violate the Due Process clause of the Federal constitution.

**Argument.**

(1) The Registered demand made on taxpayer, copy of which is Exhibit "D" to the Bill of Complaint, shown at pages 79-80 of the Certified Transcript of the Record, is the measure of the jurisdiction against taxpayer to make additional sales tax assessments against him for the years 1937 and 1938. Jurisdictional facts must affirmatively appear from the face of the record. Taxpayer denied the jurisdiction. He claimed he kept adequate records and preserved his invoices for a period of two years. Without jurisdiction of the subject-matter, taxpayer was denied Due Process of law, and the Orders and judgment against him are null and void. The decision of the State court is in conflict with prior Federal and State court decisions.

In *Twining* v. *New Jersey*, 211 U. S. 78, 110, the Court held that Due Process of law requires that the court or commission which assumes to determine the rights of parties shall have jurisdiction.

In *Powell* v. *Alabama*, 287 U. S. 45, 68, this Court held that a legally competent tribunal having jurisdiction of the

case constitutes a basic element of the constitutional requirement of due process of law.

In *Scott* v. *McNeal*, 154 U. S. 34, 46, this Court held that no judgment of a court is due process of law, if rendered without jurisdiction in the Court.

In the case at Bar, taxpayer was proceeded against without jurisdiction. The State court held the Commissioner had other jurisdiction to make additional sales tax assessments than where taxpayer failed to maintain adequate records and preserve invoices for a period of two years. The State court said:

> "The right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records in Section 6 of the statute is to permit the Commissioner, when the taxpayer's records are inadequate, to determine the correctness of the return made by him 'from the best information available.' "

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this Court said:

> "In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice. Reynolds *v.* Stockton, 140 U. S. 254, 268, 269, 35 L. Ed. 464, 468, 469, 11 Supt. Ct. Rep. 773."

It is well established by a long line of decisions of this Court that a judgment may be impeached for want of jurisdiction.

In *Earle* v. *McVeigh*, 1 Otto (91 U. S.) 503, 23 L. Ed. 398, and *Borden* v. *Fitch*, 15 Johns. (N. Y.) 141, the Court held

that in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction makes it utterly void and unavailable for any purpose.

It has long since been settled by decisions of this Court, that courts cannot go beyond the power delegated to them, and want of jurisdiction may be raised by the parties or by the court itself.

In *John Valley* v. *Northern F. & M. Co.*, 254 U. S. 348; *Elliott* v. *Peirsol*, 1 Pet. 328, and *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U. S. 8, the Court held that such judgments are not merely voidable, but void, and this even prior to reversal.

In Kentucky v. Powers, 201 U. S. 1; *Ex parte Bollman*, 4 Cranch. 75; *United States* v. *Hudson*, 7 Cranch. 32, 33, and *Jones* v. *United States*, 137 U. S. 202, 211, this Court held that courts cannot transcend that jurisdiction.

In *Brown* v. *Keene*, 8 Pet. 112, 115, and *Hanford* v. *Davies*, 163 U. S. 273, 279, the Court held that the record must show affirmatively the fact on which jurisdiction depends. The Court said it is not sufficient that jurisdiction may be inferred argumentatively, from its averments.

The Court held that the facts on which the jurisdiction rests must, in some form, appear on the face of the record.

In *Scott* v. *McNeal*, 154 U. S. 34, and *Old Wayne Mut. L. Asso.* v. *McDonough*, 204 U. S. 8, the Court held that no judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

In *Galpin* v. *Page*, 85 U. S. (19 Wall) 21 L. Ed. 959, the Court said:

> "The facts essential to the exercise of a special jurisdiction must appear in such cases upon the record."

The decision of the state court against appellant, taxpayer, is contrary to every decided case of that court. In addition to the cases cited by appellants, in their brief in opposition to the Motion to Dismiss or Affirm, there are hundreds of others similar in effect.

In *Henderson Molpus Co.* v. *Gammill,* 115 So., at pages 719, 720, 149 Miss. 600, 603, the state court, through Justice Cook, said:

> "It is established by a long line of decisions of this court, that, where a court exercises a special, limited, statutory jurisdiction, nothing is presumed in aid of its jurisdiction, but the record of the proceedings must affirmatively show the existence of every jurisdictional fact necessary to authorize it to act; otherwise its proceedings and judgments are void. Board of Supervisors *v.* Ottley, 146 Miss. 696, 107 So. 753; Smythe *v.* Whitehead, 133 Miss. 184, 97 So. 529; Monroe County *v.* Minga, 127 Miss. 702, 90 So. 443; Robertson *v.* Bank, 115 Miss. 840, 76 So. 689; Henry *v.* Board of Supervisors, 111 Miss. 434, 71 So. 742; Robb *v.* Telegraph Co., 104 Miss. 165, 61 So. 170, 977; Adams *v.* Bank, 103 Miss. 744, 60 So. 770; Hinton *v.* Perry County, 84 Miss. 536, 36 So. 365; Bolivar County *v.* Coleman, 71 Miss. 836, 15 So. 107; Marks *v.* McElroy, 67 Miss. 545, 7 So. 408."

In *Adams, State Revenue Agent,* v. *First Nat. Bank of Greenwood,* 193 Miss. 774, 60 So. 772, the Supreme Court of Mississippi, through Justice Reed, held that a judgment void for want of jurisdiction over the subject-matter, may be enjoined in equity.

In *Ng Fung Ho* v. *White,* 259 U. S. 276, this Court held that the claim that the person to be deported was a citizen, was a denial of an essential jurisdictional fact, and before the Commissioner could proceed he must prove jurisdiction.

2. Orders of quasi-judicial tribunals, commissions and bodies, must be supported by evidence. Unless they are

based on evidence, they are unconstitutional, null and void. The decision of the state court is contrary to prior Federal and state court decisions.

In *Morgan* v. *United States,* 304 U. S. 1, 21, 22, this Court held that requisites of a fair hearing are that the course of proceeding shall be appropriate to the case and just to the party affected; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it.

In *U. S.* v. *Abilene & Southern Ry.,* 265 U. S. 274; and *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio,* 294 U. S. 63, this Court held that nothing can be treated as evidence which is not introduced as such, and a finding without evidence is beyond the power of the commissioner, and violates the Fourteenth Amendment to the Constitution of the United States.

In *Atchison, T. & S. R. Co.* v. *United States,* 295 U. S. 193, 201, 202, this Court held that orders of a quasi-judicial commission must be based on evidence.

In *The Chicago Junction* case, 264 U. S. 258; *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528; *I. C. C.* v. *Louisville & N. R. R. Co.,* 227 U. S. 88, and *Lehigh Valley R. Company* v. *United States,* 243 U. S. 412, this Court held that Orders of administrative tribunals, quasi-legislative and quasi-judicial, must be supported by evidence.

In *Florida E. C. R. Co.* v. *United States,* 234 U. S. 167, this Court held that refusal to consider the evidence which was introduced or properly offered for introduction, or to make a material finding without evidence, is arbitrary action, and an order so made must be reviewed by the Courts.

In this appeal case, the state court held the decision of the first appeal case was the law of the case and res judicata. In the first appeal case, entitled *Viator* v. *State Tax Commission of Mississippi, et al.,* 193 Miss. 266, 5 So. (2d) 487, 62 S. Ct. 1109, 62 S. Ct. 1275, the state court held it could not

consider the question of lack of evidence to sustain the administrative order, because on certiorari it could only examine errors of law arising or appearing on the face of the record.

3. Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts, otherwise they are unconstitutional, null and void, and violate the Fourteenth Amendment to the Constitution of the United States. The decision of the state court is in conflict with prior Federal and state court decisions.

In *Atchison, T. & S. R. Co.* v. *United States,* 295 U. S. 193, 201, 202, this Court held that Orders of quasi-judicial commissions and bodies must be supported by a finding of basic facts, otherwise they are unconstitutional, null and void, and violate the Due Process clause of the Constitution of the United States.

Section 1, Chapter 150, Laws of Mississippi of 1938, requires the Excise Commissioner to make "* * * a report in writing setting forth a review of the cause and the essential facts of the matter."

Here, the Excise Commissioner heard taxpayer's appeal from the action of the Commissioner (the Chairman of the State Tax Commission) but the former failed to report in writing setting forth a review of the cause and the essential facts of the matter. Instead, he wrote a letter to the Commission, advising, in part, as follows:

> "After (a) full consideration of all evidence and matters presented by the taxpayer, it was the opinion of the Excise Commissioner, and concurred in by the District Supervisor, the Field Auditor and the Attorney for the Commission, that the additional tax should remain as assessed."

Taxpayer's next appeal to the entire Commission, provided by this section (1), above, was an idle ceremony. Not

having heard the testimony of witnesses, and without the required report in writing, setting forth a review of the cause and the essential facts of the matter, there was nothing before the entire Commission upon which to predicate and base the Final Order against taxpayer, dated May 24th, 1940 (R. 74-76). The state court held it was unnecessary for the Commission to again set forth the facts on which the assessment was made. What facts could the Court have had in mind? Certainly not the conclusions of the Excise Commissioner that the assessment should remain as originally assessed—in which conclusions he wrote he was supported by the District Supervisor, the Field Auditor and the Attorney for the Commission. The statute does not require concurrence of any agent of the state, be he District Supervisor, Field Auditor, or Attorney for the Commission. When taxpayer objected to the report of the Excise Commissioner, he was brushed aside, and merely permitted to read his objections. Such objections appear in the record of the first appeal of this cause to this Honorable Court. As the Bill of Complaint charges, there was no evidence to sustain the assessments, either before the Excise Commissioner, or the entire Commission. On the contrary, taxpayer testified at length that he did not owe the tax, and that he maintained adequate records and preserved invoices for a period of two years. In fact his records were examined by appellees, and photostat copies of said records made, but they were not introduced in evidence. Opposed to the testimony of taxpayer, were the statements of the Field representatives of the Commission that they made the assessments purposely high to take care of whatever they might find, and by comparing the business of taxpayer for the years 1937 and 1938, because of which the additional assessments are alleged to have been made, with the business of other merchants in Gulfport in the year

1939. That is positively the extent of the proof against taxpayers, if proof that is.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, it was insisted by the Government that under the Hepburn Act of 1906, 34 Stat. 584, 49 U. S. C. A. Sec. 1, which provides that rates should be set aside if, after hearing, the Commission shall be of the opinion that the charge was unreasonable, an order based on such opinion is conclusive and could not be set aside, even if the finding was wholly without a substantial evidence to support it. That contention was denied in no uncertain terms. The Court said:

> "But the statute gave the right to a full hearing, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitutional condemnation of all arbitrary exercise of power."

Again, in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, supra, it was further insisted by the Government that the Commerce Act, 26 Stat. 743, 49 U. S. C. A. Sec. 12, required the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created (as the State Tax Commission contends in the case at Bar; that it can make additional sales tax assessments from the best information available) and having been given legislative power to

make rates, it could act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. To this contention the Court said:

> "But such a construction would nullify the rights to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The Commission is an administrative body, and, even when it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can a party test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission h-ad been it extraneous, unknown but presumptively sufficient, evidence to support its finding."

The above principle of law was reiterated in *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274. In that case the contention was made that the order of the Interstate Commerce Commission was invalid because it rested upon evidence not legally before the Commission. It was conceded that the finding of the Commission related, in part,

from data taken from the annual reports filed with the Commission by the carriers; that the reports were not put in evidence through excerpts. The Court held that the Order of the Commission was void, for a finding without evidence is beyond the power of the Commission, and nothing can be treated as evidence which is not introduced as such.

In the case at Bar, appellees argued in the Courts below, and will argue here, that it must be presumed that the Commission had the "best information available" before it when the additional sales tax assessments were made against taxpayer, and, since such is a prima facie case, nothing need be introduced or proven. As previously shown, copies of the additional returns and assessments were not attached to the Registered demand for payment; they were not introduced in evidence. In fact they were not even shown to the taxpayer. It is appellants' contention, even if copies of the returns and assessments are attached to the Registered demand, and put in evidence, such prima facie case disappears when taxpayer petitioned for the hearing, for the obvious reason that the statute (Section 6, Chapter 113, Laws of 1938) required, and requires, the Commissioner to investigate the matter fully before proceeding further under the Section.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241, this Court said:

> "We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of viol-ating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority de-

pends on determinations of fact, those determinations must be shown."

As the court said in *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, 43 S. Ct. 51, 55, 67 L. Ed. 124:

> "In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this."

Referring to the ruling in the *Wichita* Case, the Court said in *Mahler* v. *Eby*, 264 U. S. 32, 44 S. Ct. 283, 288, 68 L. Ed. 549:

> "We held that the order in that case, made after a hearing and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion, not only on the language of the statute, but also on general principles of constitutional government."

If this court, as said in *Panama Refining Co.* v. *Ryan*, supra, did not "* * * regard the President as immune from the application of these constitutional principles", how, then, can appellees, Commission, its Chairman, and the Excise Commissioner, escape the conclusion that such constitutional principles require their Orders to contain the ex-

press findings mentioned in Section 1, Chapter 150, Laws of 1938. It is the "report in writing, setting forth a review of the cause, and the essential facts of the matter," mentioned by the Legislature in the enactment, that prevents the statute from being purely a delegation of legislative power, and affords taxpayer Due Process of law, by requiring appellees, Commission, its Chairman, and the Excise Commissioner, to find in accordance with the facts of the matter. Appellees usurped power never conferred on them. The Commissioner, first, refused taxpayer a hearing in a constitutional sense; said he would not investigate the matter fully, or at all. He failed and refused to inform taxpayer of the state of case against him; failed and refused to introduce evidence, would not permit taxpayer to cross-examine witnesses against him, and sustained his arbitrary assessments for additional sales tax, made on anonymous informations, condemned by the Emperor Trajan in his letters to Pliny, on the purely capricious actions of the Field representatives of the Commission, in making the assessments purposely high to take care of whatever they might be able to find, and by comparing the business of taxpayer, in the years 1937 and 1938, with business done by other merchants in the year 1939. The Excise Commissioner, next, refuse-d to "take the testimony of witnesses, verbally, or in writing, take depositions, * * * require the production of books and other records and papers * * * make copies of same." And "* * * submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter."

Third, and last, the whole commission, mentioned in Section 1, Chapter 150, Laws of 1938, was without constitutional right to render its decision on the appeal. Not having heard the testimony of witnesses, with no evidence

before it, and without a report in writing setting forth a review of the cause and the essential facts of the matter, it was powerless to adjudge liability against taxpayer, and render its decision on such appeal.

Notwithstanding these salient facts, and they are facts: the sworn Bill of Complaint charges them as facts, and the demurrer admits them as such, the state court affirmed, holding it could not consider the lack of evidence, but only errors of law. The state court, in affirming the decree of the learned Chancellor sustaining demurrer to the Bill of Complaint, said the decision in the first appeal case, from an adverse judgment in certiorari proceedings, was the law of the case and res judicata. The court said:

> "The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment."

The state court refused to permit taxpayer to show anything in the former cause, as the opinion of the court clearly and forcibly shows. In the former appeal case, when taxpayer attacked the order against him, because it was made without evidence, and contrary to the indisputable character of the evidence offered by taxpayer, the state court said:

> "Another of the appellant's complaints is that 'there is no presumption in favor of the validity of an order unless there is evidence to support such order.' The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari, is 'confined to the examination

of questions of law arising or appearing on the face of the record and proceedings.' "

The arbitrary action of appellees, Commission, its Chairman, and the Excise Commissioner, against appellant taxpayer, was not only concurred in by the state court, but will be perpetuated against appellant, taxpayer, and the sureties on his certiorari and appeal bonds, unless this Honorable Court intervenes to do justice and protect them in their constitutional rights.

In *Bratton* v. *Chandler,* 260 U. S. 110, this Court held that a state law establishing a commission for licensing real-estate brokers, where it authorizes the commission to require and procure proof of honesty of each applicant, would be unconstitutional if interpreted to mean that the commission might procure such proof secretly, without giving the applicant notice or opportunity to learn its nature and source and to meet it.

In *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 419, this Court held that any course of procedure which has for its object the taking of property to satisfy an alleged legal obligation and which yet accords no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the Supreme law of the land can hardly be termed "due process of law."

In *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild,* 224 U. S. 510, this court held that the hearing which must precede the taking of property is not a mere form; the owner must have the right to secure and present evidence; he must be given the opportunity by proof and argument to controvert the case asserted against him before a tribunal bound not only to listen but to give legal effect to what has been established.

In *Bratton et al.* v. *Chandler et al.,* 260 U. S. 110, this Court held that a statute regulating and licensing does

not authorize procuring of evidence without opportunity to meet it.

In *Powell* v. *Alabama, supra,* 287 U. S. 45, 68, and *Frank* v. *Mangum,* 237 U. S. 309, 340, the Court held that notice and hearing are preliminary essentials to the passing of an enforceable judgment, and that they, together with a legally competent tribunal, having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. (4) Attempt by state to measure tax on person's property or income by reference to another's property or income is contrary to due process of law, and violates the Fourteenth Amendment to the Constitution of the United States. The decision of the state court is in conflict with prior federal and state court decisions.

In *Hoeper* v. *Tax Commission of Wisconsin et al.,* 284 U. S. 206, 52 S. Ct. 120, this Court, through Mr. Justice Roberts, held the provision of a statute of Wisconsin, for addition of wife's income to husband's in computing husband's tax liability void as denying due process, and that an attempt by a state to measure tax on person's property or income by reference to another's property or income in contrary to due process.

The field representatives of the State Tax Commission of Mississippi, on examination by appellant taxpayer before the Excise Commissioner, admitted they made the assessments against taxpayer purposely high to take care of whatever they might be able to find, and by comparison with the business of other merchants in Gulfport, Mississippi, in the year 1939. Here, then, is an example of a state measuring the tax on appellant taxpayer's income and receipts of business, by reference to another's property and income, and such action is contrary to, and violates, the Fourteenth Amendment. Appellant taxpayer was denied due process of law. The Wisconsin statute

could not be sustained, and appellants respectfully submit the state statutes of Mississippi cannot be sustained. While the Wisconsin statute provided, in express language, for such action of the Tax Commission of Wisconsin, and the court condemned it and reversed the judgment of the state court, the Mississippi statute only provides that the Commissioner may make such additional assessments "from the best information available", without defining "best information". Nevertheless, appellees, Commission, its Chairman, and the Excise Commissioner, and the state court, sustained the tax against appellant on such arbitrary and capricious information and declaration. Such action is at variance with the rudiments of fair play, and the essential requirements of due process. It is far worse than anonymous informations, but no information. Counsel for appellees bodly admitted before the state court that such was done, and he even contended that such could lawfully be done.

(5) Where, as in this appeal case, taxpayer has no adequate remedy in the state courts, state statutes do not allow recovery of interest, no appropriation has ever been made by the Legislature of Mississippi to pay interest, the statute does not fix the rate, the state court holds no interest can be paid, and recovery, in any event, is made to depend upon the discretion of the Attorney General and the Chairman of the State Tax Commission, taxpayer is entitled to enjoin the collection of the challenged tax, particularly where the Federal right asserted cannot be preserved otherwise. The decision of the state court is in conflict with prior Federal and state court decisions.

Appellant, taxpayer, alleges and the demurrer admits, that he cannot pay the tax assessed against him; he does not have the money.

The authorities to sustain this proposition are set forth in appellants' Brief in Opposition to the Motion to Dis-

miss or Affirm, filed in this cause, and in the interest of brevity are not again included here.

Section 3276, Mississippi Code of 1930, copied in the jurisdictional statement of appellants, and in their Bill of Complaint (R. 36, 37, 38), provide that before any refund of taxes can be made the Attorney General must be of the opinion that the claim should be paid, and he must then give his approval. Where, then, is the legal remedy of taxpayer to control the discretion of that official of the state?

EXCEPT FROM LETTER OF ATTORNEY FOR STATE TAX COMMISSION

Under date of November 20, 1943, while this present appeal case was, and is, pending in this court, the Attorney for the State Tax Commission of Mississippi wrote Counsel for appellants, concerning a claim for refund that had been made by him, in part, as follows:

> "I am writing to the District Office for this information; and as soon as I receive same, I shall be in position to advise you positively as to whether or not the refund will be recommended. However, you are doubtless aware of the fact that the actual approval of any refund of taxes rests solely in the discretion of the Attorney General, our only province in the matter being to certify as to the correctness of any application as reflected by the records of this department."

The letter quoted from, above, is copied and whom in the Appendix to this brief.

While this is not an appeal direct from an adverse decision of a three-judge Federal Court, appellants submit that the principles of law announced by this court, through Mr. Chief Justice Stone, in *Matthews* v. *Rodgers*, 284 U. S. 521 52 S. Ct. 217, 76 L. Ed. 447, and *Great Lakes Dredge*

*& Dock Co.* v. *Huffman*, 63 S. Ct. 1073, the latter recently decided, and citing the *Matthews* v. *Rodgers Case*, are applicable here. If, as the sworn Bill of Complaint charges, and the demurrer admits, appellant taxpayer does not have the money to pay the challenged tax, and the state court holds he must pay the tax and then sue to recover it, his asserted Federal right cannot be preserved without the injunction prayed for in the Bill of Complaint filed in this cause.

(6) State statute permitting recovery of unconstitutional tax, does not afford adequate remedy where taxpayer is unable to pay the tax because he does not have the money, and the tax collecting officer is unable to respond to judgment. The decision of the state court is in conflict with prior Federal and state court decisions.

*Matthews* v. *Rodgers, supra;*

*Great Lakes Dredge & Dock Co.* v. *Huffman, supra.*

No money can be paid to satisfy the judgment of any court of Mississippi, against a tax collecting official, or otherwise against the State, in the absence of a Legislative appropriation made for that purpose. No money has ever been appropriated by the Legislature of Mississippi to pay judgments rendered by any court in cases of this kind.

This is settled law in Mississippi, by the decisions of the state court in *State* v. *Cole*, 81 Miss. 174, 32 So. 314, and *Cobert* v. *State*, 86 Miss. 769, 39 So. 65.

The appropriations made by Chapters 78, Laws of 1938, 81, Laws of 1940, and 11, Laws of 1942, copied in appellants' Bill of Complaint, were made to refund taxes "erroneously paid to the state tax commission", not unlawfully assessed and collected by its chairman and thereafter recovered in an action against him. Moreover, there is no authority whatever to recover interest, even on taxes erroneously paid.

Erroneous payment of taxes, by the terms of these appropriation statutes, are to be refunded according to the provisions of Section 3276, Mississippi Code of 1930, as amended by Chapter 260, Laws of 1938, which provides that upon proper application of the claimant, not on the rendition of a judgment, the auditor shall "make a careful investigation of" it, or if he", not a court, "shall find that any taxes or moneys have been" erroneously paid into the treasury of the State, he shall audit it and submit such audited claim to the attorney general for "his", not the court's, "inspection and approval", and if the "attorney general", not the court, "be of the opinion that such claim should be paid he shall approve the same."

The Court's attention is especially invited to the provisions of each of these appropriation bills, to the effect, that no refund shall be made except where the claim is "supported by a certificate of *overpayment*, or *erroneous payment*", not unlawful collection, "issued by the chairman of the state tax commission", not the circuit judge.

The circuit judge has no power to compel the auditor to audit a claim which has been solemnly adjudicated to be correct. If any different result should follow the audit, which would prevail, the audit or the judgment? What if the attorney general disagreed with the circuit judge and the judgment of the circuit court? What if all was harmony until the claim reached the chairman of the state tax commission, and he concluded all were in error, the circuit judge and the attorney general, and, hence, declined to certify to overpayment? The circuit judge and the court has no inherent power to order him to certify to such overpayment, where he does not feel there has been an overpayment. The challenged statutes do not authorize, or require, the circuit court to command the chairman to certify to the judgments of the court.

On the contrary, Section 8, Chapter 113, Laws of 1938,

provides that on receipt of a certified copy of the judgment, the auditor shall issue his warrant and the treasurer shall "pay such judgment out of any funds in the state treasury". But, and here is another pitfall, against what funds shall the warrant be drawn? Out of what shall the judgment be paid?

According to two of the ablest opinions that ever were delivered by the Supreme Court of Mississippi, the taxpayer would recover nothing whatever.

In *State* v. *Cole, supra,* Justice Terrall said:

> "There are in our constitution many provisions that are self-executing, and not requiring legislative action to make them effective; but they are unmistakable from their terms, and manifestly section 212 is not one of this character. It does no more than fix the rate of interest on trust funds held by the state at 6 per cent., and to direct its semiannual distribution, leaving the legislature the carrying into effect of the sovereign will as thus expressed. Who is to make the distribution, and to whom, and out of what funds, and in what manner? The means of payment and all the details are for the legislature to provide. What means has the state for payments, except by taxation? It devolves on the legislature to provide by taxation for the maintenance of the state government in all its departments and the discharge of all its obligations. The state has no means of existence except by the exercise of the sovereign power of taxation. The constitution does not impose any taxes, except the poll tax by section 243, and must be held to have left the discharge of the obligation declared by section 212 to be by the legislature, on which it devolves to provide ways and means for the discharge of all obligations of the state. There is no just ground for the supposition that the framers of the constitution intended to dispense with legislative action as to the payment on trust funds, and to require it as to maintaining the existence of the state government, which cannot

live without money, and cannot get money without legislative action. Not an officer of the state can be paid his salary except with money raised by taxation, and after appropriation therefor by the legislature. The members of the legislature are dependent upon the same provisions for their pay. No money can come into the treasury or go out of it lawfully except as directed by legislative act. Collection and disbursement of public money belonging to the legislature, and must be done as it directs. A state treasurer and an auditor are provided for by section 134 of the constitution, but it was left to legislation to prescribe their duties, and the provisions of the Code of 1880 as to these were continued in force as provided by section 274 of the constitution."

In *Colbert* v. *State, supra,* Justice Cox said:

"But even if it should be conceded that the exercise of the state's option was an executive, rather than a legislative, function, or, this being denied, if it be conceded that the Legislature intended, and in effect commanded, that the Governor exercise the state's option, still, in our judgment, the Governor was without power to order the bonds in question paid, for the simple reason that the legislature had made no appropriation for their payment. Such an order under such circumstances was virtually an executive appropriation of the money required to pay the bonds. The proposition so stated is its own refutation. Legislative control over the treasury, which we recognize as the supreme legislative prerogative, involves the necessity of legislative appropriation in order to the payment of moneys out of the treasury. This is a fundamental law. It is written in express terms or by necessary implication in the constitution of all free states. Clause 7 of section 9 of article 1 of the constitution of the United States declares that 'no money shall be drawn from the treasury but in consequence of appropriations made by law'. The Constitution of Mississippi of 1869 declared that 'no money

shall be drawn from the treasury, except on appropriations made by law'. Vide section 26 of article 4. The Constitution of 1832, art. 7, Section 7, declared that 'no money shall be drawn from the treasury but in consequence of an appropriation made by law', and the same provision in the same language is found in the Constitution of 1817, art. 6, Section 8, under which Mississippi was admitted to the Federal Union. We cannot be persuaded that the omission from the Constitution of 1890 of a similar express provision indicates a purpose upon the part of the great jurists and publicists who framed that instrument to abrogate this essential principle of constitutional government. This fiscal scheme which they provided and ordained negatives the idea. By section 63 of the Constitution it is provided that 'no appropriation shall be passed by the Legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury'. By section 64 it is provided that 'no bill passed after the adoption of this Constitution to make appropriations of money out of the state treasury shall continue in force more than six months after the meeting of the Legislature at its next regular session; nor shall such bill be passed except by the votes of a majority of all the members elected to each house of the Legislature'. Section 68 declares that 'appropriation and revenue bills shall, at regular sessions of the Legislature, have precedence in both houses over all other business, and no such bills shall be passed during the last five days of the session'. Section 69 declares that: 'General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative and judicial departments of the government, to pay interest on state bonds, and to support the common schools. All other appropriations shall be made by separate bills, each embracing but one subject. Legislation shall not be engrafted on appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what

purpose paid'. Section 73 empowers the Governor to veto parts of any appropriation bill and approve parts of the same, and declares that the parts approved shall be law. When we consider all these provisions together, and note the jealous and wise restrictions imposed by the Constitution upon legislative power in the matter of the appropriation of public moneys, we are constrained to believe that the Constitution regards the Legislature as the sole repository of power to make appropriations of moneys to be paid out of the state treasury. We can no more infer the possibility of an appropriation by executive action of moneys for the payment of public debts than we could the levying of taxes by executive action for the same purpose. If the one may be inferred, the other may also; and thus the entire constitutional scheme for Legislative control over the public revenues be subverted."

(7) Where state statutes provide for a hearing, and inadequate and unfair hearings are granted Orders so made are unconstitutional, null and void, and violate the Due Process clause of the Federal constitution. The decision of the state court is in conflict with prior Federal and state court decisions.

*Kwock Jan Fat* v. *White*, 253 U. S. 454;
*Morgan* v. *United States*, 304 U. S. 1, 21, 22;
*Morgan* v. *United States*, 298 U. S. 468;
*Interstate Commerce Comm.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91;
*Stuart* v. *Palmer*, 74 N. Y. 183, 190;
*Florida E. C. R. Co.* v. *United States*, 234 U. S. 167;
*Whitfield* v. *Hager*, 222 Fed. 745;
*U. S.* v. *Abilene & Southern Ry.*, 265 U. S. 274;
*West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio*, 294 U. S. 63;
*Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 201, 202;

The Commissioner, mentioned in Section 6, Chapter 113, Laws of 1938, refused to investigate the matter fully; said he would not investigate it at all. He failed and refused to inform taxpayer of the state of case against him, introduced no evidence, produced no witnesses, and did not give taxpayer an opportunity to cross-examine witnesses against him. Taxpayer testified and introduced evidence, showing conclusively that he made returns and paid all taxes he owed as sales tax for the years 1937 and 1938. The Orders and judgment against taxpayer are contrary to the indisputable character of the evidence introduced by him, and were made without any evidence on the part of appellees, Commission, its Chairman, and the Excise Commissioner. His appeal to the Excise Commissioner, provided by Section 1, Chapter 150, Laws of 1938, availed naught. No witnesses were produced against him, no evidence, documents and other pertinent information, and at the conclusion of the hearing, he, the Excise Commissioner, failed and refused to make a report in writing, setting forth a review of the cause and the essential facts of the matter. Taxpayer's further appeal to the entire Commission was a farce and a sham. The report of the Excise Commissioner was adopted and the assessments sustained without any further showing. The Circuit Court of Hinds County affirmed and rendered judgment on the Order of the Commission of May 24th, 1940. The Supreme Court of Mississippi affirmed the judgment of the Circuit Court, holding it could not, and would not, consider the merits of the case. When taxpayer and the sureties on his certiorari and appeal bond brought forward all of the facts of the case, conclusively showing the arbitrary and capricious action of the Commission, its Chairman, and the Excise Commissioner by sworn Bill of Complaint, the state court held the decision of the first appeal was the law of the case and res judicata. Taxpayer does not now

know what it is all about; he stands convicted without having had his day in Court; without a hearing in a Constitutional sense, without evidence, and contrary to the accepted course of judicial proceeding. He cannot pay the tax and sue for its recovery. He does not have the money. He could not recover interest on his money, if he could pay it, and he could not compel the auditor of public accounts to audit the claim, the attorney general of the state to be of the opinion that his claim should be paid, and the Chairman of the State Tax Commission to certify to overpayment. He, therefore, does not have an adequate remedy in the state court. His business and property will be taken away without due process. Unless this Honorable court takes jurisdiction and decides the case, he will not be secure in his constitutional rights, and his constitutional rights will not be preserved to him.

### Excise Tax Statutes Should Be Strictly Construed Against the Taxing Authority, and in Favor of the Taxpayer.

Every decided case in Mississippi sustains this position, excepting only the decision in the two Viator cases. Cases of the state court holding that the excise tax statutes should be construed against the taxing authority, and in favor of the taxpayer, are the following, to mention but a few of the hundreds of cases decided by the State court:

*Miller* v. *Illinois Cent. R. Co.*, 146 Miss. 422;
*State* v. *Union Tank Car Co.*, 151 Miss. 797;
*Pan American Petroleum Corporation* v. *Miller*, 154 Miss. 565;
*McKenzie* v. *Adams-Banks Lumber Co.*, 157 Miss. 482;
*L. H. Canara Furniture Co.* v. *Miss. State Tax Comm.*, 160 Miss. 185;
*Gully* v. *Jackson International Co.*, 165 Miss. 103;
*Town of Utica* v. *State ex rel. Rice*, 166 Miss. 565.

In *Gully, State Tax Collector* v. *Jackson International Company, supra,* the state court said:

> "The laws are to be strictly construed against the taxing power. The power cannot be implied. All doubts must be resolved in favor of the taxpayer."

In *Town of Utica* v. *State, ex rel, Rice, supra,* the state court said:

> "Tax laws are to be strictly construed against the taxing power. This power cannot be implied, and all doubts must be resolved in favor of the taxpayer."

In *State, ex rel, Rice, Attorney General,* v. *Louisiana Oil Corporation,* 174 Miss. 585, the state court said:

> "Laws imposing excise or privilege taxes are construed favorably to the citizen and are not imposed unless clearly within the provision of such law, nor are they imposed upon a doubtful interpretation or by implication."

In *Railroad Company* v. *Clarke,* 95 Miss. 689, the state court said:

> "Laws imposing privilege taxes are to be liberally construed in favor of the citizen, and courts will not extend the statute imposing such taxes beyond the clear meaning of the language employed."

The sales tax laws of Mississippi are specially declared to be privilege tax laws.

In *State, ex rel Collins, Attorney General,* v. *Grenada Cotton Compress Co.,* 123 Miss. 191, the state court said:

> "The rule is well settled that laws imposing duties or taxes are not to be construed beyond the natural import of the language, and are never to be construed as imposing burdens upon citizens upon doubtful interpretation."

In *Miller* v. *Illinois Central Railroad Company*, 146 Miss. 422, the state court said:

> "Tax laws are to be strictly construed against the taxing power. If the right to tax is not plain, it cannot be implied. Doubts are resolved in favor of the taxpayer. Before one is liable for taxes, he must come within the express provisions of the taxing statute."

In *Pan American Petroleum Company* v. *Miller, State Tax Collector, supra*, the state court said:

> "It is also a well recognized and fundamental rule of statutory construction that tax laws are to be construed in favor of the taxpayer, and the rule of strict construction in favor of the taxpayer prevails. As we understand this rule, the courts will not extend and expand a statute imposing a tax burden, to make it include either subjects or persons not within the terms of the statute. The laws imposing privelege taxes are to be construed favorably to the citizen, and no occupation is to be taxed unless clearly within the provisions of such law."

Appellants could go on and on, citing and quoting state cases, but such would only extend this brief to undue length. Suffice it to say, the decision against appellant, taxpayer, is the first in the history of the state where the state court held the power to tax could be implied.

In the first appeal case against appellant, taxpayer, the state court said:

> "The Chairman of the State Tax Commission possesses only such powers as are conferred on him by statute expressly *or by implication.* * * *".

Appellant, taxpayer, and petitioner in the Petition for Certiorari filed herein, was thus denied the equal protection of the law. To the same effect is the holding of the

state court against taxpayer in the former appeal case, the judgment of which is now said by the state court to be the law of this case and res judicata, wherein the state court sustains the jurisdiction of appellees, Commission, its Chairman, and the Excise Commissioner. Every other decided case in Mississippi, as heretofore shown holds to the contrary. The court has always held that jurisdictional facts must be shown and they must appear of record. Appellant, taxpayer, was thus, again, denied the equal protection of the law.

## Summary and Conclusion.

It is respectfully submitted that the preceding argument fully supports, and indeed requires, the following conclusion:

First: The state court has decided a Federal question of substance contrary to decisions of this Court, and contrary to the general law.

Second: The state court has denied appellants and petitioners due process of law and the equal protection of the law.

Third: The challenged statutes, as construed and applied, are unconstitutional, null and void.

Fourth: Appellants, petitioners, and more particularly taxpayer, were proceeded against without jurisdiction, without evidence, without an opportunity to know the state of case against him, and cross-examine witnesses against him, without a report in writing setting forth a review of the cause and the essential facts of the matter, and were denied due process of law and the equal protection of the law.

On these grounds it is respectfully submitted that the judgment below should be reversed and the Mississippi statutes of 1938 should be declared invalid and their en-

forcement against appellants, petitioners, permanently enjoined.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the decree appealed from the Supreme Court of Mississippi to this Court may be reversed, and the case decided in favor of petitioners, or that the Decree appealed from may be reversed and the case remanded to the state court with directions to proceed in accordance with the opinion and decision of this Court, to the end that petitioners may be secure in their constitutional right, may have their day in court, be proceeded against in accordance with the general law, the accepted course of judicial proceeding, and be advised of the state of case against them, by the introduction of evidence, an affirmative showing of jurisdiction, a finding of essential fact, and a judgment according to law and justice, and that petitioners may be granted due process of law and the equal protection of the law, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Mississippi, and finally reverse it.

ALBERT SIDNEY JOHNSTON, JR.,
*Counsel for Petitioners.*

## APPENDIX.

### STATE TAX COMMISSION

A. H. Stone, Chairman
J. E. Davis, Excise Commissioner
M. C. Young, Ad Valorem Commissioner

Jackson, Mississippi

November 20, 1943.

Hon. Albert Sidney Johnston, Jr.,
Attorney at Law,
Biloxi, Mississippi.

Dear Mr. Johnston:

In re: Robert P. Gaude, t/a Brown Derby Bar, Biloxi, Miss.
v. A. H. Stone, Chairman, et al.

Your letter of November 15, addressed to the attention of Mr. Stone, in the absence of Mr. Stone from the office, has been referred to me for reply. I understand the nature of your letter to be an application for refund of the sum of $138.49 paid by the above named taxpayer as additional sales tax demanded, based upon an audit made by Mr. W. R. Smith, a field man connected with the Gulfport District Office.

I assume, of course, that the correct procedure was followed in demanding this tax. But in order that I may intelligently answer your letter, indicating the action of this department with reference to whether or not a refund will be recommended, it will be necessary for us to have full information from the District Office concerning this demand and collection.

I am writing to the District Office for this information; and as soon as I receive same, I shall be in position to advise you positively as to whether or not the refund will be recommended. *However, you are doubtless aware of the fact that the actual approval of any refund of taxes rests solely in the discretion of the Attorney General, our only province in the matter being to certify as to the cor-*

*rectness of any application as reflected by the records of this department.* (*Emphasis* supplied.)

Very truly yours,

(Signed) J. H. SUMRALL,
*Attorney, State Tax Commission.*

CC: Mr. R. M. Hill,
District Supervisor,
Gulfport, Mississippi.

Section 6, Chapter 113, Laws of 1938. Be it enacted, that Section 8 of chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, be and the same is hereby amended so as to read as follows:

Taxpayer must keep records—failure to make returns—duty and power of commissioner.

Section 8. It shall be the duty of every person engaging or continuing, in this state, in any business for which a privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep such records shall subject the person so failing to all the penalties of this act.

If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, the commissioner may make additional returns and assessments from the best infor-

mation available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty five per cent for the first offense and fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section.

Section 8, Chapter 113, Laws of 1938. Be it enacted, that Section 10 of chapter 119, laws of 1934, be and the same is hereby amended so as to read as follows:

Aggrieved person may file petition.

Section 10. If any person having made a return and paid taxes thereon feels aggrieved by the additional assessment made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within ten days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider such petition, and shall grant such hearing, notifying the petitioner of the time and place fixed for such hearing. After such hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly

charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to cover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the supreme court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of section 420, code of 1930, shall not apply to taxes imposed by this act.

Section 1, Chapter 150, Laws of 1938. The governor shall designate the other associate commissioner as "excise commissioner", who shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved

in the appeal. The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol.

Chapter 78. House Bill No. 94.

AN ACT making an appropriation for the purpose of refunding income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and light wine and beer taxes, which may be erroneously collected and paid into the state treasury by the state tax commission during the fiscal years 1938 and 1939.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the following sum, or so much thereof as may be necessary, be and the same is hereby appropriated, out of any money in the state treasury not otherwise appropriated, to carry out the provisions of the several laws of the state imposing the taxes hereinafter enumerated, in connection with section 3276 of the Mississippi code of 1930, providing for the refunding of income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and taxes on light wines and beer, erroneously paid to the state tax commission and paid into the

state treasury, for the fiscal years 1938 and 1938, beginning July 1, 1938, and ending June 30, 1940.....$50,000.00

Section 2. That the refund of any such taxes erroneously paid, shall be made by the state treasurer out of any money in the state treasury not otherwise appropriated, upon warrants issued by the auditor of public accounts, which warrants shall be issued in accordance with the provisions of section 3276 of the Mississippi code of 1930, and the claims filed with the auditor of public accounts under the provisions of said section 3276 shall, in each instance, be supported by a certificate of Over-payment, or erroneous payment, issued by the chairman of the state tax commission.

Section 3. That this act take effect and be in force from and after its passage.

Approved January 25, 1938.

Chapter 81, House Bill No. 933.

AN ACT making an appropriation for the purpose of refunding income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and light wine and beer taxes, which may be erroneously collected and paid into the state treasury by the state tax commission during the fiscal years 1940 and 1941.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the following sum, or so much thereof as may be necessary, be and the same is hereby appropriated, out of any money in the state treasury not otherwise appropriated, to carry out the provisions of the several laws of the state imposing the taxes hereinafter enumerated, in connection with section 3276 of the Mississippi code of 1930, providing for the refunding of income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and taxes on light wines and beer, erroneously paid to the state tax commission and paid into the state treasury, for the fiscal years 1940 and 1941, beginning July 1, 1940, and ending June 30, 1942..$50,000.00

Section 2. That the refund of any such taxes erroneously paid, shall be made by the state treasurer out of any money

in the state treasury not otherwise appropriated, upon warrants issued by the auditor of public accounts, which warrant shall be issued in accordance with the provisions of section 3276 of the Mississippi code of 1930, and the claims filed with the auditor of public accounts under the provisions of said section 3276 shall, in each instance, be supported by a certificate of over-payment, or erroneous payment, issued by the chairman of the state tax commission.

Section 3. That this act take effect and be in force from and after its passage.

Approved April 26, 1940.

Chapter 11, House Bill No. 603.

An ACT making an appropriation for the purpose of refunding income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and light wine and beer taxes, which may be erroneously collected and paid into the state treasury by the state tax commission during the fiscal years 1942 and 1943.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That the following sum, or so much thereof as may be necessary, be and the same is hereby appropriated, out of any money in the state treasury not otherwise appropriated, to carry out the provisions of the several laws of the state imposing the taxes hereinafter enumerated, in connection with section 3276 of the Mississippi code of 1930, providing for the refunding of income taxes, inheritance taxes, franchise taxes, tobacco taxes, malt taxes, amusement taxes, sales taxes and taxes on light wines and beer, erroneously paid to the state tax commission and paid into the state treasury, for the fiscal years 1942 and 1943, beginning July 1, 1942, and ending June 30, 1944: $50,000.00

Section 2. That the refund of any such taxes erroneously paid, shall be made by the state treasurer out of any money in the state treasury not otherwise appropriated, upon warrants issued by the auditor of public accounts, which warrant shall be issued in accordance with the provisions of section 3276 of the Mississippi code of 1930, and the

claims filed with the auditor of public accounts under the provisions of said section 3276 shall, in each instance, be supported by a certificate of over-payment, or erroneous payment, issued by the chairman of the state tax commission.

Section 3. That this act take effect and be in force from and after its passage.

Approved March 3, 1942.

MISSISSIPPI CODE 1930

3276. Taxes erroneously paid refunded.—If any person, firm or corporation has paid or shall hereafter pay to the auditor of public accounts or to any tax collector, through error or otherwise whether paid under protest or not, any ad valorem, privilege or excise taxes for which such person, firm or corporation was not liable, or if any such taxpayer has paid any such tax in excess of the sum for which he or it was liable, and any such erroneous payment or overpayment has been paid into the proper treasury, then, in any such event, the auditor of public accounts is hereby authorized and required, upon proper application of any such claimant, to make a careful investigation of all such claims, or, if he shall find that any taxes or moneys have been, or may hereafter be, erroneously paid into the treasury of the state, county, or levee boards, for the purchase or redemption of lands erroneously sold for taxes heretofore or hereafter by any tax collector, he shall audit such claims against each separate fund in proportion to the amount paid over to such fund in each case, and he shall submit such audited claim with the voucher and evidence on which such claim is based, to the attorney-general for his inspection and approval, and if the attorney-general be of the opinion that such claims should be paid he shall approve the same, and the auditor shall thereupon file such voucher and other papers necessary in each case, in his office, as a voucher, and issue his warrant on the state treasury in favor of the claimant for the amount of purchase-money or taxes erroneously paid into the state treasury, and the auditor shall audit the amount of taxes paid the county and levee boards, as the case may

be, and shall certify the amounts found to be due to the clerk of the board of supervisors and secretary of the levee board, and the said board of supervisors, or levee board, shall cause the warrant to be issued on the treasurer of the county, or levee board, in favor of the claimant as certified by the auditor of public accounts, as the case may be, and the county depository, or the treasurer of the levee board, is hereby directed, authorized and required to pay such claims; provided, that it shall not be necessary in order to authorize such refund that the taxpayment was made under protest or because of coercive measures taken on the part of the collecting officers. Provided, however, that nothing in this section shall be so construed as to authorize the recovery or repayment of any tax heretofore levied and collected by any special road district, drainage district, or separate school district, on account of, or upon the ground that the law authorizing such tax was unconstitutional, whether the unconstitutionality of such tax be based upon the creation or mode of operation of any special road district, drainage district or separate school district. Provided further, that nothing in this section shall be construed as authorizing the refunding of state taxes paid into the state treasury through error, or otherwise, without an appropriation first being made to pay such refund or refunds.

(9463)

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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## No. 457

---

EDDIE J. VIATOR, J. A. VIATOR, J. J. VIATOR, ET AL.,

*Appellants,*

*vs.*

R. C. EDWINS, SHERIFF OF HARRISON COUNTY, MISSISSIPPI, ET AL.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

J. H. SUMRALL,
*Counsel for Appellees.*

# INDEX.

## Subject Index.

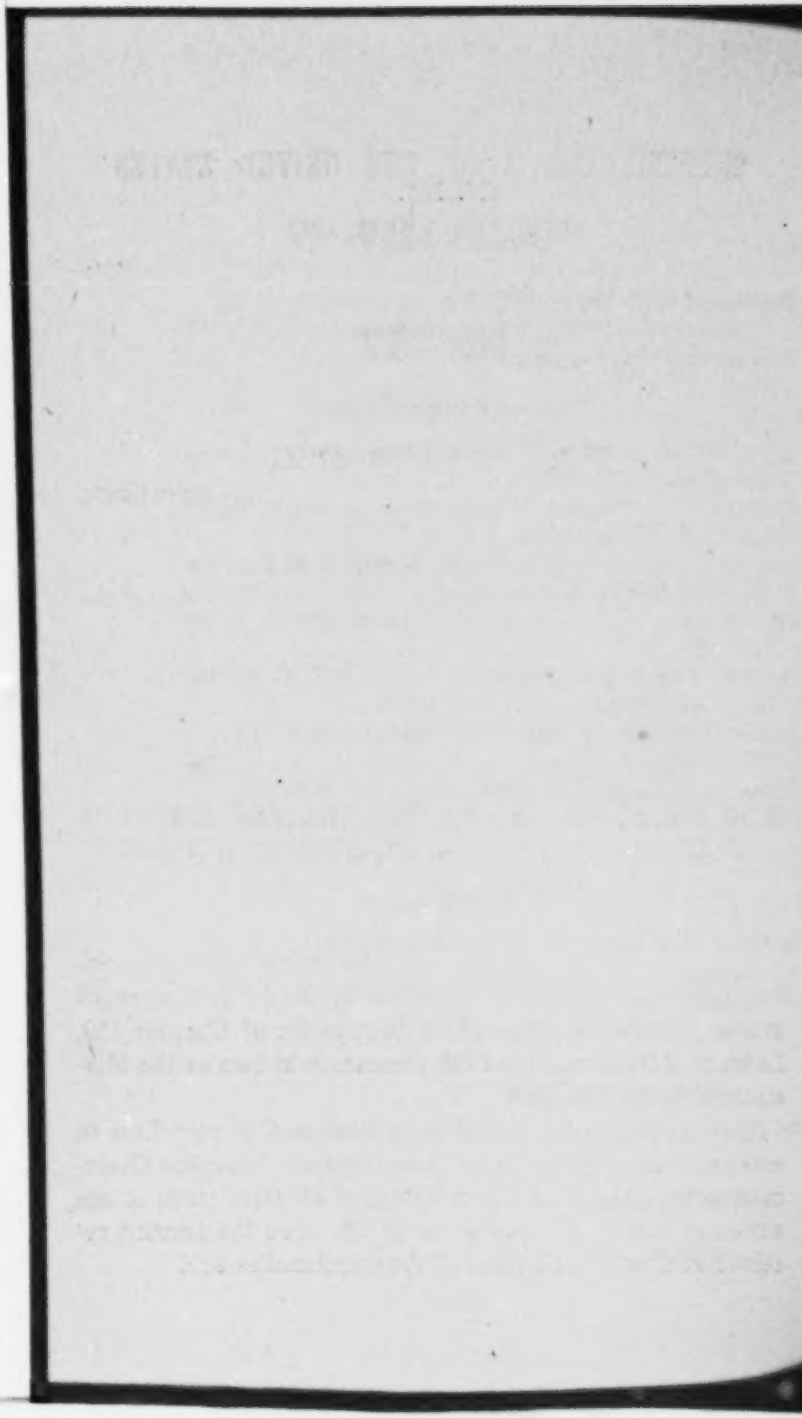

| | Page |
|---|---|
| Statement opposing jurisdiction | 1 |
| Questions involved are unsubstantial | 5 |
| Motion to dismiss or affirm | 7 |


## Table of Cases Cited.


| | |
|---|---|
| *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 86 L. Ed. 802 | 6 |
| *Chicago, Rock Island & Pacific Railway Co.* v. *Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27 | 5 |
| *City of Boston* v. *Jackson*, 260 U. S. 309, 67 L. Ed. 274 | 5 |
| *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 | 6 |
| *Moorehead* v. *New York, ex rel. Tipaldo*, 298 U. S. 587, 80 L. Ed. 1347 | 6 |
| *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 81 L. Ed. 1229 | 6 |
| *Stone, Chairman of State Tax Commission* v. *Kerr*, 10 So. (2) 845 | 5 |
| *Viator* v. *Edwins*, 193 Miss. 266, 5 So. (2d) 487, 316 U. S. 644, 62 Sup. Ct. 1109, 86 L. Ed. 1728, 316 U. S. 711 | 3 |


## Statutes Cited.


| | |
|---|---|
| Laws of Mississippi for 1934, Chapter 119: | |
| Section 2-c | 1 |
| Section 5 | 1 |
| Section 8 | 2 |
| Section 10, as amended by Chapter 113, Laws of Mississippi for 1938 | 2,4,5 |
| Rules of the Supreme Court of the United States: | |
| Rule 7, para. 4 | 5 |
| Rule 12, para. 3 | 5 |



# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

---

## No. 457

---

EDDIE J. VIATOR, ET AL.,

*vs.* *Appellants,*

R. C. EDWINS, SHERIFF, ET AL.,

*Appellees.*

---

APPEALED FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

## STATEMENT OF APPELLEES AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

This case involves the liability of a citizen of Mississippi engaged in the sale of merchandise by the conduct of retail stores, for the tax imposed by Section 2-c of Chapter 119, Laws of Mississippi for 1934, commonly known as the Mississippi Sales Tax Law.

This taxpayer was required by Section 5 of said Law to make monthly reports to the Commissioner, being the Chairman of the State Tax Commission, of all sales made in the previous month, and pay a tax of 2% upon the amount received as a retail sale price of the merchandise sold.

Section 8 of said Law requires the taxpayer to preserve for a period of two years all invoices indicating the amount of merchandise purchased for sale, which invoices and records are open to inspection by representatives of the Commissioner charged with the duty of administering the Sales Tax Law. And said Section provides that if adequate records are not kept, the Commissioner may make additional returns and assessments from the best information available, which returns and assessments shall be prima facie correct, and the amount of tax shown to be due shall be a lien against all the property of the taxpayer.

Section 10 of the Act as amended by Chapter 113, Laws of Mississippi for 1938, provides that where a taxpayer feels aggrieved by the additional assessment of taxes against him, he may file a petition in writing requesting a hearing before the whole Commission, to oppose the correctness of said assessment, and the Commission shall grant a hearing and make such order in the matter as may appear to it just and lawful.

The record in this case, as disclosed by former opinions, shows that notice of additional assessment was made against Eddie J. Viator, the principal appellant and taxpayer, in September, 1939. That a petition was filed and hearings granted thereon, and a final order entered by the Commission sustaining the correctness of the additional assessment made.

Section 10 of said Act, as amended, provides that where any taxpayer feels that he is improperly charged with a tax and required to pay same, that he may pay said tax and recover same together with interest and cost by filing suit in the Circuit Court in his county, and upon recovery of judgment, the Auditor of Public Accounts is required to issue a warrant for the amount of the judgment obtained, and the Treasurer of the State of Mississippi is required to pay said warrant.

The record discloses that instead of pursuing the statutory method provided, this taxpayer elected to remove the matter to the Circuit Court of Hinds County of Mississippi by Writ of Certiorari. And upon the hearing of said cause, a judgment was entered by the Circuit Court of Hinds County against the taxpayer, E. J. Viator, and J. A. Viator, and J. J. Viator, sureties on the Certiorari Bond.

An appeal was taken to the Supreme Court of Mississippi from the judgment rendered by the Circuit Court of Hinds County, Mississippi, and the Supreme Court of Mississippi affirmed the judgment of the Circuit Court of Hinds County by an In Banc opinion rendered on the 12th day of January, 1942. A suggestion of error was filed in the Supreme Court of Mississippi, and the Supreme Court overruled said suggestion of error on February 9, 1942. The said judgments of affirmance, and overruling suggestion of error appearing in 193 Mississippi, Page 266, 5 So. (2d) 487.

An appeal to the Supreme Court of the United States being applied for, was granted, and on April 27, 1942, the appeal to this Court was dismissed for want of jurisdiction; and treating the papers filed as an application for Certiorari, the Certiorari was denied. See 316 U. S. 644, 62 S. Ct. 1109, 86 L. Ed. 1728.

A petition having been filed for a rehearing was denied by this Court on May 25, 1942. See 316 U. S. 711.

When the Mandate from this Court was sent to the Supreme Court of Mississippi, the Mandate of the Supreme Court of Mississippi was sent to the Circuit Court of Hinds County, where the judgment appealed from was rendered. An abstract of the judgment was then issued by the Clerk of the Circuit Court of Hinds County and said judgment was enrolled on the Judgment Roll of Harrison County, the county of the residence of the three persons against whom the judgment had been rendered. An execution was then requested of the Clerk of the Circuit Court of Harrison

County, which execution was issued and placed in the hands of the Sheriff, R. C. Edwins, the Sheriff of Harrison County, Mississippi.

When the Sheriff undertook to levy the execution, the judgment debtors filed a Bill in the Chancery Court of Harrison County praying for an injunction against the Sheriff, and the Tax Commissioner, to prevent the levying and execution of said writ of said execution.

A Demurrer was filed to the Bill of Complaint by the defendants setting up the fact that by the provisions of said Section 10 of the Sales Tax Law, providing an adequate and exclusive remedy for the recovery of taxes improperly paid, and prohibiting the issuance of an injunction to restrain the collection of the Sales Taxes, that no injunction could properly be issued.

The contention was also made by said Demurrer that the identical questions being presented by the Bill of Complaint had already been decided by the Circuit Court, affirmed by the Supreme Court of Mississippi, and appeal dismissed by this Court, that said decisions were res judicata, and that the former decisions constituted the "Law of the Case". And the Chancellor sustained the Demurrer and dismissed the Bill.

An appeal with supersedeas being prayed for in open Court, the appeal was granted, and the case appealed to the Supreme Court of Mississippi.

The Supreme Court of Mississippi affirmed the decree of the Chancellor on the 7th day of June, 1943. See 14 So. 2d. 212. The Court holding that the Chancellor's decision was correct, and that the questions involved were res judicata, and the Law of the Case settled by the previous decision.

A suggestion of error was filed in the Supreme Court of Mississippi and overruled on the 9th day of July, 1943. An application for a certificate from one of the Judges was

filed by the Appellants on August 7, 1943, and said application for certificate was denied September 27, 1943.

An appeal was then prayed for to this Court, which appeal was granted on the 28th day of September, 1943, hence filing of this record in this Court.

**Questions Involved Are Unsubstantial.**

The questions presented to this Court are so unsubstantial as not to need further argument, all of same having been fully presented and passed upon by the Supreme Court of Mississippi, and jurisdiction denied by this Court as hereinbefore set out. And this Court should, therefore, dispose of the case, either by dismissal of the appeal or by affirmance. See Rule 7, Section 4; Rule 12, Section 3; *Chicago, Rock Island & Pacific Railway Company* v. *Devine,* 239 U. S. 52, 60 L. Ed. 140, 36 S. Ct. 27; *City of Boston* v. *Jackson,* 260 U. S. 309, 67 L. Ed. 274.

The sole question that can be presented to this Court in view of the former decisions in this same case by this Court and the Supreme Court of Mississippi, is the validity of the provision of Section 10 of the Mississippi Act prohibiting the granting of an injunction to restrain the administration of the Sales Tax Law and the collection of the Sales Tax, and said question has been decided by the Supreme Court of Mississippi in the case of *Stone, Chairman of State Tax Commission,* v. *Kerr,* decided on the 7th day of December, 1942, and reported in 10 So. (2d) 845. The Court holding in said case that because the provisions of Section 10 provided an adequate, ample, and complete remedy at Law, that such provision was exclusive, and, therefore, the decision of the Chancellor in denying the injunction and dismissing the Bill was correct.

It is well settled that the construction of a state statute by the highest court of the state is binding on the Supreme

Court of the United States, and that this Court will follow the decisions of the highest court of the state in construing the statute. Among the recent cases in which this rule has been announced are:

*Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 81 L. Ed. 1229;

*J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233;

*Moorehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 80 L. Ed. 1347;

*Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 86 L. Ed. 802.

In view of this rule the following language of the Supreme Court of Mississippi used in the decision of this case is pertinent, said language being as follows:

> "The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based.
>
> The instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. The contentions here made are identical and represent a continued attack upon the authority of the State Tax Commission and the validity of the former judgment."

This Court having by its previous decision settled the only questions of Law involved in this appeal, except the right to injunctive relief, and the Supreme Court of Mississippi having reiterated in the opinion appealed from, the same conclusion on the same questions now raised before this Court; and the Supreme Court of Mississippi having construed the state statute with reference to denial of the

injunction, there is no question remaining of which this Court will take jurisdiction.

Wherefore, the appellees hereby move the Court to dismiss this appeal or affirm the judgment herein appealed from.

Respectfully submitted,

R. C. EDWINS,
*Sheriff;*
A. H. STONE,
*Chairman, Mississippi State Tax Commission;*
J. E. DAVIS,
*Excise Commissioner;*
By J. H. SUMRALL,
*Attorney for Appellees.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 457

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EDDIE J. VIATOR, Et Al.,
*Appellants, Petitioners,*

*vs.*

R. G. EDWINS, Sheriff, Et Al.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

---

Albert Sidney Johnston, Jr.,
William L. Guice,
*Counsel for Appellants, Petitioners.*

# INDEX.

## Subject Index.

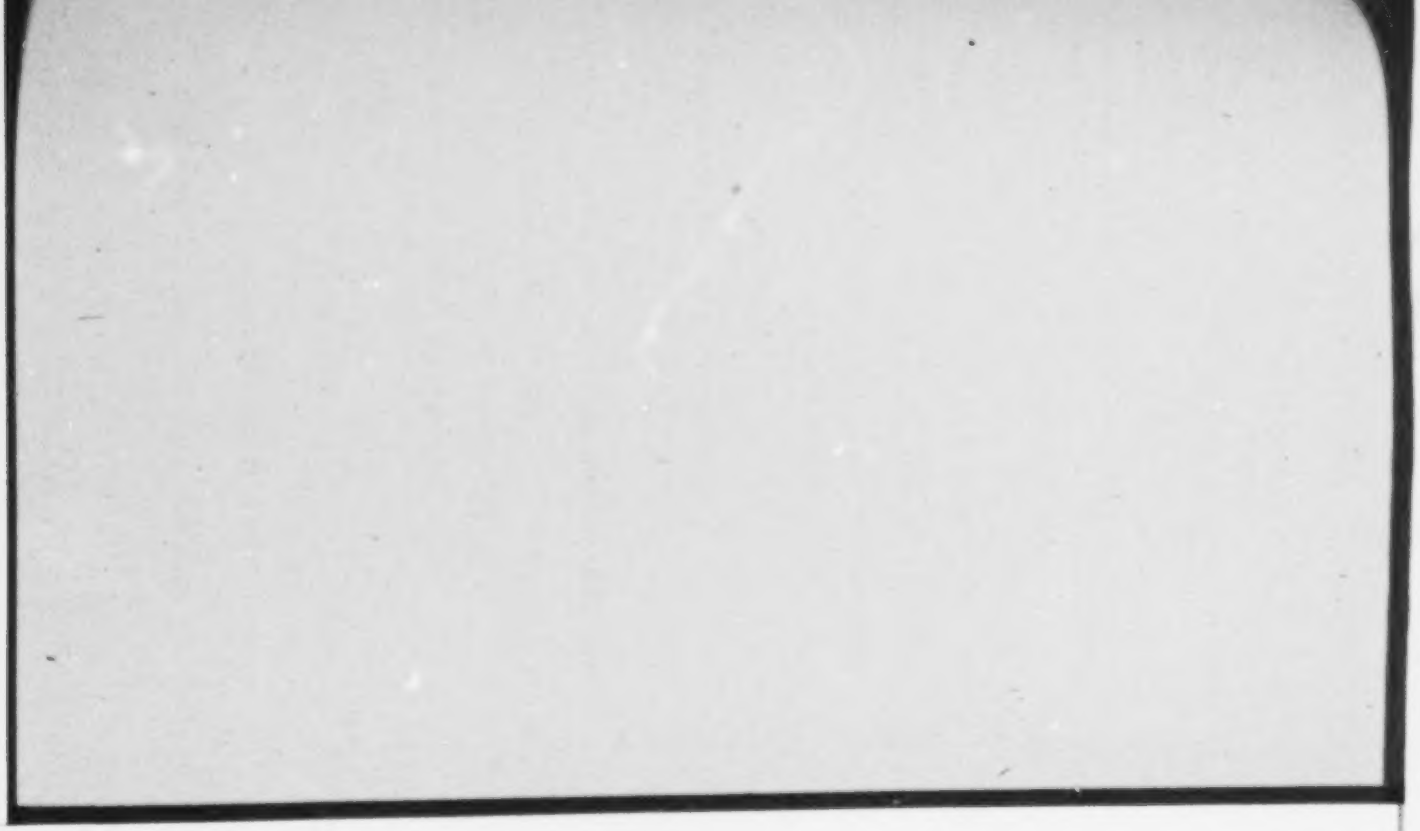

| | Page |
|---|---|
| Petition for rehearing | 1 |
| Brief in support of petition for rehearing | 7 |
| Conclusion and prayer for rehearing | 15 |


## Table of Cases Cited.


| | |
|---|---|
| *Baver* v. *Chess Co.*, 83 Miss. 222 | 11 |
| *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 | 9 |
| *Hoeper* v. *Tax Commission of Wisconsin, et al.*, 284 U. S. 206, 52 Sup. Ct. 120 | 10 |
| *Myers* v. *Martinez*, 95 Mis. 104 | 11 |
| *Patterson* v. *Ingraham*, 23 Miss. 87 | 11 |
| *Tennant* v. *Barksdale*, 3 So. (Miss.) 80 | 11 |
| *Truax* v. *Corrigan*, 257 U. S. 312 | 14 |
| *Waddell* v. *DeJet*, 76 Miss. 110 | 11 |


## Statutes Cited.


| | |
|---|---|
| Griffith's Mississippi Chancery Practice, Sections 286, 288 | 10, 11 |
| Constitution of the United States, 14th Amendment | 7, 8 |



# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

---

## No. 457

---

EDDIE J. VIATOR, ET AL.,
*Appellants, Petitioners,*

*vs.*

R. C. EDWINS, SHERIFF, ET AL.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

---

## PETITION FOR REHEARING.

---

Come now the above named Appellants, and Petitioners, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

1. The judgment of the State court does not rest upon a basis adequate to support it; if a State court can preclude an appellant from asserting a Federal right, by a mere recitation in such judgment, then no appellant can ever successfully appeal to the Supreme Court of the United States, because, no matter what the state of the case against such appellant, the State court can always prevent an appeal to the Supreme Court of the United States.

2. The opinion of the State court, by Alexander, J., rendered on June 7, 1943, shown in the record of this cause, is a far cry from the law and the facts of the case. The opinion states that "It is hardly necessary to add that the demurrer did not admit the allegations of the bill as to the irregularity of the former proceeding and as to the invalidity of the judgment, which are mere conclusions of law." The Bill of Complaint charges facts to support the claim of the invalidity of the judgment, and overwhelmingly shows cogent reasons for such charge. The irregularities charged in the former proceeding, which eventuated in an adverse judgment on Certiorari, are shown on the face of the judgment itself. The State court refused to consider the merits of the case, said it could not consider the charge of lack of evidence to support the Order, because on Certiorari, it could and would only consider errors of law. The charge of lack of evidence, and that the Order was made without evidence to support it, and contrary to the indisputable character of the evidence introduced by appellant, was itself a question of law.

3. The State court has misstated the law of Mississippi, and the law of the land, and misapplied the law to the meager facts that do not appear. The State court purposely avoided deciding the Federal Question to prevent a review by the Supreme Court of the United States.

4. The Bill of Complaint charges, as facts, the following:

(a) Taxpayer was proceeded against jurisdiction, contrary to and beyond the case attempted to be made against him by the pleadings and notice of additional assessment.

(b) Taxpayer was proceeded against without evidence, and contrary to the indisputable character of the evidence offered by him, that he kept adequate records and preserved invoices, and did not owe any additional sales tax.

(c) The Field Representatives admitted they made the two additional sales tax assessments against taxpayer, purposely high, to take care of whatever they might be able to find, and by comparing the business of taxpayer, in the years 1937 and 1938, for which said additional assessments are said to have been made, with the business of other merchants in the year 1939.

(d) Said additional assessments are made, and the orders made and entered against taxpayer, without a finding of essential facts; of (1) Jurisdiction, and (2) Any factual showing of liability for additional sales tax, contrary to law and the evidence, and in an unconstitutional, unlawful, and illegal manner.

(e) The orders entered against taxpayer contain no finding of basic fact and essential fact, showing jurisdiction and liability for additional sales tax.

5. The demurrer to the Bill of Complaint admits the following:

(a) Appellees were without jurisdiction of the subject matter, and to make additional sales tax assessments, because they failed to prove that taxpayer neglected and failed to keep adequate records and preserve invoices.

(b) There was no evidence to sustain said additional assessments, and said additional assessments were made against taxpayer contrary to the indisputable character of the evidence offered by taxpayer.

(c) The Field Representatives of the State Tax Commission made the two additional sales tax assessments against taxpayer purposely high to take care of whatever they might be able to find, and by comparing the business of taxpayer in the years 1937 and 1938, for which said additional assessments are alleged to have been made, with the business of other merchants in the year 1939.

(d) Said additional assessments were made, and the orders made and entered against taxpayer, without a

finding of essential fact of (1) jurisdiction, and (2) a factual showing of liability for additional sales tax.

(c) The orders entered against taxpayer contained no finding of basic and essential fact showing jurisdiction and liability for additional sales tax.

6. The State court erroneously, and without foundation in fact, states that taxpayer was given an opportunity both by the Chairman of the Commission, and by the Tax Commission itself, to negative by evidence the facts on which the assessment was based. The Bill charges, and the demurrer admits, the assessments were not based on evidence, but made purposely high to take care of whatever the Field Representatives of the Commission might be able to find, and by comparing the business of taxpayer in the years 1937 and 1938, because of which the additional assessments are claimed to have been made from the best information by reason of the fact that taxpayer failed to maintain adequate records and preserve invoices for a period of two years, with the business of other merchants in Gulfport in the year 1939. When taxpayer challenged the additional assessments, and claimed they were made without evidence to support them, the State court held it could not and would not consider the charge of lack of evidence, and would only consider questions of law arising or appearing on the face of the record. When all of these facts were brought before the Court by sworn Bill of Complaint, admitted by demurrer, the State court holds the decision in the former appeal is the law of the case.

7. The State court erroneously, and without foundation in fact, states that the instant proceeding therefore constitutes an attempt to show what might have been shown in the former cause. In the former proceeding the State court refused to permit taxpayer to show anything, brushed aside his claim of constitutional right, failed to decide the

Federal question, without which the decision could not be made, and adds insult to injury by saying that regardless of conditions precedent to the exercise of the right to injunctive relief, under Section 420, Mississippi Code of 1930, the taxes against the collection of which the injunction was sought are, in view of the former decision of the State court, not "attempted to be collected without authority of law."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Mississippi, be, upon further consideration, reversed.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
*Counsel for Appellants, Petitioners.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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# No. 457

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EDDIE J. VIATOR, ET. AL.,
*Appellants, Petitioners,*

*vs.*

R. C. EDWINS, SHERIFF, ET AL.

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## BRIEF IN SUPPORT OF PETITION FOR REHEARING.

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MAY IT PLEASE THE COURT:

There is one question, and one question alone, involved in our petition for rehearing, but it is our serious belief that the court in the light of fundamental constitutional rights as claimed by the petitioner, including rights given under the Fourteenth Amendment, should give serious thought to this petition, which is in no wise filed in a frivolous manner, or for the purpose of delaying the prompt execution of the mandate of this honorable court.

We claim that, while the Mississippi Supreme Court may not have so intentionally desired or intended, the effect of Judge Alexander's decision is to deny this Court's consideration of a constitutional right asserted by the petitioner

and of utmost importance, not alone to him, but to many other persons who may be faced with the same situation.

It might not have been the intention of the Supreme Court of Mississippi to have intentionally erred in deciding the case in the court below, on a purely non-Federal question, and thereby have prevented a consideration of our client's rights under the constitution by this Court. However, the effect of the court's decision is the same as we shall attempt to show here by an illustration.

In times past this Court has decided, and very properly decided, that in cases where a member of the negro race was convicted of crime, and it appeared that intentionally or purposely over a period of time, members of his race were excluded from the Grand and Petit Jury, that such action would violate his rights under the 14th Amendment, and other pertinent sections of the Constitution. This was decided by the court even though in these cases, otherwise, the following facts had appeared.

A. A legal Grand Jury was convened.

B. A legal indictment was returned.

C. An impartial and fair trial supported by evidence was had.

D. And a judgment rendered in accordance with the State law.

E. The court had jurisdiction of the subject matter before it.

Yet the ommission of one vital right that the man possessed invalidated the entire proceedings. Therefore, we assert that where many rights were denied us, all of which prevented a fair trial by some Tribunal of the question, whether or not taxes were due the State of Mississippi, it is

not just that our clients' constitutional rights should be ignored merely because the Supreme Court of Mississippi thought this case had been decided in a prior decision.

We call to the court's attention the decision of the Supreme Court of Mississippi in this case found as appendix B to the Brief of Appellant in opposition to motion to dismiss or affirm.

This decision would not foreclose our right to assert a defense based upon questions of fact, *dehors* the record. In fact, in the most emphatic terms, Judge Smith stated as follows:

> "Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code of 1930, the court to which a case has been removed by a writ of certiorari is 'confined to the examination of questions of law arising or appearing on the face of the records and proceedings'."

As appears from the decision of Chief Justice Smith, rendered on January 12, 1942, the unlawful proceedings of the State Tax Commission of Mississippi was approved on the ground that said Commission could make additional assessments for sales tax without regard to the reasons given in the notice to taxpayer. We earnestly contend that such action is condemned by this Court in the case of *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, where the court said:

> "In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent, and the record shows no consent, is contrary to fundamental principles of justice. *Reynolds* v. *Stockton*, 140 U. S. 254, 268, 269, 35 L. Ed. 464, 468, 469, 11 Sup. Ct. Rep. 773."

In the suit filed in the Chancery Court of Harrison County, Mississippi, the petitioner and appellant here, the complainant there, aside from raising the questions of law previously raised, and which might have been in the Record and considered by the Supreme Court in the case Judge Smith decided, raised further vital questions of fact, all of which were they true, would have meant that our client was not only deprived of the equal protection of the law and his property taken without due process of law, but that this was done in an arbitrary and brutal manner by the State Tax Commission, who Gestapo-like went riding amuck, striking at will with the whip of taxation, against all persons whom their agents felt animus towards.

We charge that although the law provided for a hearing, that no hearing was had, that there was a meeting but that at this meeting the State did not produce the evidence it claims supported its judgment. It did not allow cross-examination of the witnesses; it did not allow us to present evidence, either oral or in writing, but the examining official, in the nature of a Master who reports to a court, took the unsupported statement of one of his minions, a Field Agent, that the assessment was correct because it reflected the experience of other merchants in other years.

This honorable court in the case of *Hoeper* v. *Tax Commission of Wisconsin, et al.*, 284 U. S. 206, 52 S. Ct. 120, through Mr. Justice Roberts, held the provision of a statute of Wisconsin for addition of a wife's income to husband's, in computing husband's liability void, as denying due process, and held that an attempt by a State to measure tax on persons' property or income by reference to another's property or income is contrary to due process.

The Bill of Complaint charged these matters as matters of fact, and the demurrer admitted them as true.

Griffith's Mississippi Chancery Practice Sections 286 and 288.

From Section 286, Griffith's Mississippi Chancery Practice, we quote the following:

> "The demurrer then, is a pleading by which the defendant challenges the sufficiency of the Bill in substance, or in form and presents to the court the question of law as to whether upon such a bill, the defendant should be required to plead further; and by which, for the purpose of said challenge, and of the argument of said test in law, all the facts of the Bill well pleaded are, for the time being, admitted."

In *Tenant* v. *Barksdale*, 3 So. (Miss.) 80, and *Patterson* v. *Ingraham*, 23 Miss. 87, the Supreme Court of Mississippi said that the office of a demurrer is to submit to the court the sufficiency of the facts charged to support the legal conclusions essential to the complainant's right of action; and that by a demurrer, a party asserts his legal rights and stands on them.

From Section 288 above, we quote the following:

> "It has just been stated that, for the time being, and for all purposes of the argument of the test of law presented by the demurrer, it admits all material facts well pleaded in the Bill."

The above proposition of law is supported by the Mississippi cases of *Waddell* v. *DeJet*, 76 Miss. 110; *Baver* v. *Chess Company*, 83 Miss. 222; and *Myers* v. *Martinez*, 95 Miss. 104 and others too numerous to mention.

From Section 288 above, we further quote the following:

> "It must be noted that legal presumptions arising from facts go with the facts when the latter are sufficiently stated in the bill, and also, facts that are reasonably or necessarily implied from the facts stated may on demurrer be considered as true, and if the contrary is to be shown by co-nterva-ling facts, they must be set up in an answer and cannot be availed of by demurrer."

Here we call to the court's attention that Judge Griffith is a member of the Supreme Court of Mississippi, and that his work is recognized as authority in Mississippi.

Therefore we state as a bald, naked, legal fact that in Mississippi all facts properly pleaded are admitted by a demurrer, and that a former judgment or *res adjudicata* cannot be raised by demurrer but must be raised by plea. While the Supreme Court of Mississippi, speaking through Judge Alexander, rendered the decision being Appendix A to the brief above referred to, this opinion is not supported by authorities, is contrary to the laws of the State of Mississippi as decided by the same Court, and appears to have been rendered purely for the purpose of foreclosing on our right for this Court's consideration of a constitutional question that goes to the very right of existence of citizens of this country. We respectfully invite the court's attention to the fact that not a single authority is cited by Justice Alexander; we charge there is no authority for such opinion.

The constitution and its amendments are neither old in spirit or impotent because of age to meet every situation that faces our citizens when tyranny is attempted against them, and the one and only court that can finally say whether each citizen's plea shall remain heard or unheard, is the Supreme Court of the United States and a careful reading of Judge Alexander's opinion will show that he decided a question of fact on a demurrer which raised only questions of law and admitted all facts, and on the authority only of a previous decision, that is the decision of Judge Smith, which most emphatically stated that the court was not considering facts.

Therefore we still stand before this august tribunal asserting that not because of the language of the law, not because of the manner of hearing provided, not because

of any question that appeared in our bill, that could be a conclusion of law, but because of well pleaded questions of fact we had stated, and still state that the State of Mississippi was enforcing against us a judgment which would deprive us of our property without due process and that this judgment had not been rendered after a hearing or a trial.

The Bill charges, and we again state:

A. That we had no hearing.

B. That at the examination which was to have been a hearing, the State refused to introduce its evidence and refused us the right to produce evidence.

C. There was no consideration of any evidence when the judgment was rendered but the judgment was rendered upon the frivolous statement and allegations that our client owed this money because the experience of other merchants in other years would show that his report was insufficient.

D. The judgment was rendered arbitrarily without consideration of facts or law.

We know that a great American Jurist has stated that the right to tax is the right to destroy, but this right of destruction will not be upheld upon the appeal of any citizen unless the tax is legal and that a fair and just determination has been made as to whether or not under the law giving the tax life it has been fairly and justly determined.

Our client has not had a fair and just determination. The Supreme Court of Mississippi cannot deny this right by an opinion contrary to its own law, and wholly unsupported by the hundreds of authorities on tax questions heretofore decided by that court.

We believe our position is sound, in fact, we apologize for having taken the court's time to state it when it is so much more eloquently stated and with finer reasoning

in the case of *Truax* v. *Corrigan*, 257 U. S. 312, a part of the opinion of which reads as follows:

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at as full liberty to consider them as was the State Supreme Court. Mackay *v.* Dillon, 4 How. 431, 11 L. Ed. 1046; Dower *v.* Richards, 151 U. S. 658, 667, 38 L. Ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. Bailey *v.* Alabama, 219 U. S. 219, 238, 239, 55 L. Ed. 191, 200, 31 Sup. Ct. Rep. 145; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Mugler *v.* Kansas, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; Corn Products Ref. Co. *v.* Eddy, 249 U. S. 427, 432, 3 L. Ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern R. Co. *v.* H. Albers Commission Co. 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. *v.* Cedar Rapids, 223 U. S. 655, 668, 669, 56 L. Ed. 594, 604, 32 Sup. Ct. Rep. 389; Southern P. Co. *v.* Schuyler, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 43 L. R. A. (N.S.) 901, 33 Sup. Ct. Rep. 277. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so

intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 593, 59 L. Ed. 735, 740, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Jones Nat. Bank *v.* Yates, 240 U. S. 541, 552, 553, 60 L. Ed. 788, 797, 798, 36 Sup. Ct. Rep. 429. In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard. The only respect in such a case in which this court is bound by the judgment of the state supreme court is in the construction which that court puts upon the statute."

We therefore most respectfully submit for the court's earnest consideration this petition with the hope that our feeble efforts will at least gain us a hearing before this Court on the only question at issue in this case, which is "has our client been deprived of a vital and substantial right under the Federal Constitution."

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
WILLIAM L. GUICE,
*Counsels for Petitioners.*

No. 457. VIATOR ET AL. *v.* EDWINS, SHERIFF, ET AL. Appeal from and on petition for writ of certiorari to the Supreme Court of Mississippi. January 31, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. The petition for writ of certiorari is denied. *Messrs. Albert Sidney Johnston, Jr.* and *William L. Guice* for appellants-petitioners. *Mr. J. H. Sumrall* for appellees-respondents. Reported below: 195 Miss. 220, 14 So. 2d 212.